(13)

No. 01-417-CFX Title: Robert J. Devlin, Petitioner
v.
Robert A. Scardelletti, et al.

Docketed: September 7, 2001 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Sep 7 2001	Petition for writ of certiorari filed. (Response due November 6, 2001)
	Oct 1 2001	Order extending time to file response to petition until November 6, 2001.
	Oct 1 2001	This extension of time is granted for all respondents.
	Nov 7 2001	Brief of respondents Robert Scardelletti, et al. in opposition filed.
	Nov 20 2001	DISTRIBUTED for Conference of December 7, 2001
	Nov 21 2001	Reply brief of petitioner Robert J. Devlin filed.
	Dec 10 2001	Petition GRANTED. SET FOR ARGUMENT March 26, 2002. **********
	Jan 24 2002	Brief of petitioner Robert J. Devlin filed.
	Jan 24 2002	Brief amicus curiae of Charles C. Yeomans filed.
	Jan 24 2002	Brief amicus curiae of Council of Institutional Investors filed.
	Jan 24 2002	Brief amici curiae of Charles L. Grimes, et al. filed.
	Jan 24 2002	Joint appendix filed.
	Feb 1 2002	CIRCULATED.
	Feb 5 2002	Record filed.
	Feb 11 2002	Record filed.
	Feb 22 2002	Order extending time to file respondents' brief on the merits to and including February 27, 2002.
	Feb 27 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 27 2002	Brief of respondent Robert Devlin filed.
	Feb 27 2002	Brief amicus curiae of Citibank (South Dakota), N.A. filed.
	Feb 27 2002	Brief amici curiae of United States and Securities and Exchange Commission filed.
	Mar 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 19 2002	Reply brief of petitioner Robert J. Devlin filed.
	Mar 26 2002	ARGUED.

(1) Supreme Court, U.S.
FILED

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No. 01-____

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin was an appellant below. The Retired Employees Protective Association was also an appellant below.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parrish, Robert A. Parrish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
STATUTE INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 10
I. THE CIRCUITS ARE DIVIDED OVER WHETHER OBJECTING CLASS MEMBERS HAVE STANDING TO APPEAL A CLASS ACTION SETTLEMENT. 11
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, UNDERMINES DUE PROCESS, AND RESTS ON FLAWED POLICY RATIONALES. 15
CONCLUSION 26

TABLE OF AUTHORITIES

Pages

Cases

Agius v. *Louisiana-Pacific Corp.*, 178 F.3d 1299 (table), No. 98-15641, 1999 WL 274521 (CA9 Apr. 29, 1999) (unpub.) 14

Amchem Products, Inc. v. *Windsor*, 521 U.S. 591 (1997) 25

Bell Atl. Corp. v. *Bolger*, 2 F.3d 1304 (CA3 1993) 9, 12, 21, 24

Blair v. *Equifax Check Servs., Inc.*, 181 F.3d 832 (CA7 1999) 14

Blossom v. *The Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863) 16, 17

Carlough v. *Amchem Prods.*, 5 F.3d 707 (CA3 1993) 12

Cook v. *Powell Buick, Inc.*, 155 F.3d 758 (CA5 1998) 14

Crawford v. *Equifax Payment Servs.*, 201 F.3d 877 (2000) 13

Devlin v. *Transportation Communications Int'l Union*, 175 F.3d 121 (CA2 1999) 7

Felzen v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999) 12, 14

Gottlieb v. *Wiles*, 11 F.3d 1004 (CA10 1993) 14

Guthrie v. *Evans*, 815 F.2d 626 (CA11 1987) 14

Hinckley v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467 (1877) 17

Hovey v. *McDonald*, 109 U.S. 150 (1883) 17

In re Cement Antitrust Litig., 688 F.2d 1297 (CA9 1982), *aff'd based on absence of a quorum*, 459 U.S. 1191 (1983) 12

In re Integra Realty Resources, Inc., No. 99-1344, -- F.3d --, 2001 WL 951332 (CA10 Aug. 21, 2001) 14

In re PaineWebber Inc. Ltd. P'ships Litig., 94 F.3d 49 (CA2 1996) 9, 12

In re Synthroid Mktg. Litig., No. 00-3164, -- F.3d --, 2001 WL 1000713 (CA7 Aug. 31, 2001) 13

Kaplan v. *Rand*, 192 F.3d 60 (CA2 1999) 14, 21

Marino v. *Ortiz*, 484 U.S. 301 (1988) (per curiam) 8, 19

Marshall v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977) 9, 12

Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 16

Microsystems Software, Inc. v. *Scandinavia Online AB*, 226 F.3d 35 (CA1 2000) 14

Minnesota Co. v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609 (1865) 17

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 19

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 20

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) ..... passim

Powers v. *Eichen*, 229 F.3d 1249 (CA9 2000) 13

Sage v. *Railroad Co.*, 96 U.S. 712 (1878) 17

Scardelletti v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995) 3

Scardelletti v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997) 3

Shults v. *Champion Int'l Corp.*, 35 F.3d 1056 (CA6 1994) 14

Trustees v. *Greenough*, 105 U.S. 527 (1882) 17
Walker v. *City of Mesquite*, 858 F.2d 1071 (CA5 1988) 10
West v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621 (CA2 1934) 18
Williams v. *Morgan*, 111 U.S. 684 (1884) 17
Zucker v. *Occidental Petroleum Corp.*, 192 F.3d 1323 (CA9 1999), *cert. denied*, 529 U.S. 1066 (2000) 13

Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 1291 2
29 U.S.C. § 1054 3

Rules

Fed. R. Civ. P. 23 ..... 5, 17, 19, 23
Fed. R. Civ. P. 24 ..... 6, 21
Fed. R. Civ. P. 65 10

Other Authorities

3B J. Moore, MOORE'S FEDERAL PRACTICE 17
7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE 8, 17
ABA Comm. on Standards of Judicial Admin., STANDARDS RELATING TO APPELLATE COURTS (1994) 20
Adv. Comm. Note, Fed. R. Civ. P. 24 23
Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS (1996) 24
John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) 24

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) 24
Joseph Story, COMMENTARIES ON EQUITY PLEADINGS (10th ed. 1892) 9, 17
Robert Leflar, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS (1976) 20
Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) 23

IN THE

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ROBERT J. DEVLIN,

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ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert J. Devlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's orders denying petitioner's motion to intervene, approving the settlement, and entering a final judgment (Pet. App. B1, C1-C3) are unpublished. The Fourth Circuit's opinion (per Williams, J., joined by Anderson, D.J., sitting by designation; Michael, J., concurring in part and concurring in the judgment) (*id.* A1-A35) holding that petitioner lacks standing to appeal the settlement because he was not a named party in the district

court is designated a precedential opinion but is not yet published in the Federal Reporter.

JURISDICTION

The Fourth Circuit entered its opinion on July 27, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

This petition arises from a class action lawsuit. Respondents are the plaintiffs as well as the named representatives of the defendant class who were selected by the plaintiffs. Respondents have agreed among themselves to settle the suit.

Petitioner is a member of the defendant class who unsuccessfully sought to intervene in the suit to oppose the proposed settlement. Petitioner also filed timely objections to the settlement. The district court, however, denied petitioner's motion to intervene, rejected his objections, and approved the settlement.

The question presented is whether petitioner may appeal the district court's approval of the settlement. The Fourth Circuit held that petitioner did not have standing to appeal, expressly recognizing that petitioner would have been allowed to appeal in the Second, Third, and Ninth Circuits. It is also apparent that petitioner would have been allowed to appeal in the Seventh Circuit.

1. The suit underlying this petition involves the ERISA-governed retirement plan for the staff of the Transportation

Communications International Union. Petitioner was a full-time employee of the Union from 1963 until his retirement in 1983, at which time he began receiving retirement benefits under the Plan.

Prior to the events giving rise to this litigation, the Plan provided for a one-time, ten-percent cost of living adjustment ("COLA"). Subsequently, in early 1991, the Plan's trustees adopted a plan amendment ("the 1991 Amendment") to provide a more substantial COLA to offset the substantial reduction in retirees' effective benefits that had been caused by inflation. The 1991 Amendment provided that, every three years, beneficiaries would receive a COLA equivalent to the rate of inflation for that period, up to a maximum of ten percent per COLA ("the 1991 COLA").

Later in 1991, the Plan elected new trustees. Those trustees determined that the financial projections underlying the 1991 Amendment were incorrect, and in 1993 they eliminated the 1991 COLA for all subsequent retirees. The trustees determined, however, that as to persons (such as petitioner) who had already retired and were receiving benefits under the 1991 Amendment, the COLA was an "accrued" benefit that could not be eliminated through a plan amendment. See 29 U.S.C. § 1054(g)(1).

To recoup the costs of this accrued benefit to the Plan, the new trustees sued the old trustees, seeking damages for breach of fiduciary duties. The district court agreed that the old trustees had breached their fiduciary duties in approving the 1991 COLA based on faulty financial assumptions. The district court also initially agreed with the new trustees that the COLA was an accrued benefit for persons who had retired, see *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995), but subsequently reversed itself, see *Scardelletti* v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997). Petitioner was not a party to that litigation, and no party appealed from the district court's decision.

2. In response to the district court's decision, the new trustees unilaterally eliminated the 1991 COLA for all past and future retirees, and sought to confirm their right to do so through litigation. That suit led to the settlement between the new trustees and the class representatives that petitioner seeks to appeal.

a. To confirm their right to eliminate the 1991 COLA, the new trustees brought this defendant class action in the District of Maryland against all participants and beneficiaries of the plan, approximately 700 persons in total. The district court subsequently divided the defendant class into subclasses of retired plan beneficiaries and active plan participants.

Petitioner is a member of the retiree subclass. He is also the president of the Retired Employees Protective Association ("REPA"), a group composed of a majority of Union retirees, which seeks to preserve the retirees' benefits under the plan. The new trustees originally named petitioner as a class representative, but he declined to serve in that capacity. The trustees subsequently named a new class representative as a defendant in their suit.

The plaintiff trustees subsequently reached a proposed settlement with the class representatives. The details of the settlement are not relevant here, but in broad outline it abrogates the 1991 Amendment and essentially eliminates the 1991 COLA. The settlement thus has a very substantial negative financial effect on approximately 400 retirees such as petitioner, drastically reducing the retirement benefits that they had been receiving.

In 1997, when the trustees eliminated the 1991 COLA, petitioner's pension benefits were immediately reduced by 30.8%. Since that time, the elimination of the COLA has caused petitioner's benefits to be reduced by more than fifty percent. The figures are even higher for some other retirees.

b. Shortly after learning of the terms of the proposed settlement, petitioner formally moved to intervene in the case.

As a party intervenor, petitioner sought to take discovery, sought an injunction against eliminating the 1991 COLA, and sought to disqualify the class counsel. The district court denied the motion to intervene. Pet. App. B1. Because petitioner therefore lacked status as a party, the district court also denied as moot his motions for discovery, for an injunction, and to disqualify. *Id.*

Pursuant to Fed. R. Civ. P. 23(e), petitioner also received a notice, approved by the district court, directing class members to present all objections to the proposed settlement.[1] Petitioner properly filed timely objections on behalf of himself individually and also on behalf of REPA. Petitioner argued, for example, that the settlement was unlawful because (as the new trustees had *themselves* maintained in their prior suit against the old trustees) the 1991 COLA was in fact an accrued benefit under ERISA for pre-1991 retirees. Based on the district court's earlier, unappealed ruling to the contrary, respondents disagreed, although they had previously taken the same position.

Petitioner also maintained that the district court should not approve the settlement because it was unfair. In petitioner's view, the plan could afford to maintain the COLA at least in part by requiring active employees to make pension contributions, just as petitioner had done for many years before the plan became entirely employer funded. Respondents disagreed, arguing that the retirees had already recouped the value of their individual contributions.

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[1] C.A. App. 973-74 ("Any member of the Class who does not make his or her objection to the matters described in the Notice in the manner provided herein shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters."); Fed. R. Civ. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

Respondents also argued that the settlement fairly reflected the risks to all parties in litigating the case to judgment.

The district court agreed with respondents and rejected petitioner's objections to the settlement. The district court advised petitioner's counsel, "if I'm wrong [in rejecting the objections], you got an appeal." C.A. App. 2585; see also C.A. Supp. App. 1240 ("I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course."). The court accordingly entered a final judgment approving the settlement. Pet. App. C1-C3.

3. The trustee respondents subsequently invoked the final judgment to seek an injunction (enforced upon threat of contempt sanctions) prohibiting class members from making any court filing in any other jurisdiction that related to the subject matter of the settlement. According to the trustees, "[a]ll those attacks [on the settlement] really belong, if anywhere, here and in the Fourth Circuit." C.A. Supp. App. 897 (injunction hearing). The basis for the injunction was that each class member was bound to the settlement as a matter of res judicata. The district court agreed and enjoined all class members "from making any filing in any forum against any person * * * that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." Pet. App. D2.

4. On petitioner's appeal from the district court's final judgment, a panel of the Fourth Circuit held (i) that the district court properly denied petitioner's motion to intervene and denied as moot petitioner's further motions that depended on his status as a formal party, and (ii) that petitioner lacked standing to appeal the district court's approval of the settlement.

a. The Fourth Circuit did not doubt that petitioner had standing to appeal the district court's denial of his motion to intervene, notwithstanding that petitioner was not a formal "party" in the district court. Rather, the Fourth Circuit held that the district court properly refused to permit petitioner to intervene on the ground that his motion was untimely. Pet. App. A10 ("Under either Rule 24(a) or 24(b), the application for intervention must be timely."). Permitting petitioner to intervene at the conclusion of settlement negotiations, the court concluded, "would have likely resulted in further delay and substantial additional litigation." *Id.* A12. On that basis, the court of appeals also affirmed the district court's denial of petitioner's motions for discovery, for an injunction, and to disqualify, all of which depended on petitioner's status as a formal party. *Id.* A13 n.11.[2]

b. The panel divided on the distinct question whether petitioner nonetheless had standing to appeal the district court's approval of the *settlement*. The majority held that petitioner lacked standing and therefore refused to reach the merits of his appeal. From the outset, the majority recognized the decades-long circuit conflict on this question:

> Courts have divided on whether a class member who objects but is denied intervention has standing to appeal the merits of the class action settlement. Some courts require successful intervention before a non-named class member may challenge the merits of a class settlement

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[2] Long before respondents reached a settlement, petitioner had filed letters with the district court seeking to intervene. C.A. App. 469-77, 731-37. Petitioner did so in response to the Second Circuit's conclusion in separate litigation that disputes relating to the COLA should be resolved in the District of Maryland. See *Devlin* v. *Transportation Communications Int'l Union*, 175 F.3d 121, 132 (CA2 1999). The Maryland district court concluded that it had no obligation to consider such letters (in contrast to petitioner's subsequent formal motion to intervene), and the Fourth Circuit agreed. Pet. App. A12. That issue is not relevant to this Petition and is not raised by it.

> on appeal. [collecting decisions of the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits dating to 1987] * * * Other courts, by contrast, broadly permit non-named class members to appeal the merits of a class settlement where they objected or tried to intervene below. [collecting decisions of the Second, Third, and Ninth Circuits dating to 1977].

Pet. App. A14-A17.

The panel majority initially rejected the view of some circuits that objectors' standing is precluded on the basis of this Court's three-paragraph per curiam opinion in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), which states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled," and that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* involved only an attempt to appeal a class action judgment by persons who were neither named parties nor even class members. The majority below therefore agreed with the Second and Third Circuits that *Marino* is properly distinguished because it "did not involve members of a class action who were objecting to a class settlement." Pet. App. A16 n.12.

Nevertheless, after detailing the circuits' competing rationales, Pet. App. A15-A21, the panel majority "agree[d] with the majority of courts that the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute 'spoilers' who were not entitled to intervene below might unduly delay class settlement on appeal," *id.* A21. The majority "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representative and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Id.*

c. Judge Michael disagreed. He would have held that petitioner had standing to appeal the approval of the settlement, although he would have sustained the settlement on the merits as within the district judge's discretion to approve. Pet. App. A30-A35. Judge Michael would have adopted what he regarded as the "better reasoned precedent hold[ing] that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." *Id.* A30 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (CA2 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (CA3 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977); 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE, § 1797 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment.")).

Judge Michael explained that the right of an objecting class member to appeal dates to early equity practice and is furthermore supported by constitutional and practical considerations. Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). Because a class action settlement affects the rights of all class members, refusing to permit non-named class members to appeal raises due process concerns. *Id.* Under the majority's approach, class members will be largely unable to protect their interests because they generally do not learn of their interest in intervening until provided with notice of the proposed settlement by the district court, by which point (under the panel majority's holding) it is too late to intervene and thereby preserve their right to appeal. *Id.* A33-A34.

Judge Michael also maintained that the majority's approach undermines district courts' administration of class actions. The prospect that objectors may appeal provides an important check on collusive settlements by the class representatives and their counsel. Pet. App. A32. Moreover,

if prohibited from appealing, objectors will be more likely to opt out from the class or to institute collateral attacks on settlement orders. *Id.* A33 (citing *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (CA5 1988) (unnamed class members may "challenge the adequacy of class representation * * * by filing a separate lawsuit for that purpose")). Alternatively, district courts will be burdened with unnecessary motions to intervene, while courts of appeals, in turn, will be burdened by interlocutory appeals if intervention is denied. *Id.* A34. Conversely, as demonstrated by the experience of other circuits, there is no substantial risk that objectors will file meritless appeals of settlements, doubtless because in all but the most meritorious cases "the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a settlement after considering the objector's concerns." *Id.* A32.

d. The Fourth Circuit separately addressed petitioner's appeal from the district court's injunction against class members making any court filing in any other jurisdiction that relates to the subject matter of the settlement. The injunction rested on the fact that the entire class was bound by the settlement as a matter of res judicata. Notwithstanding the court of appeals' holding that objectors could not appeal the settlement, it nonetheless held that they could properly be enjoined from acting in derogation of it. Pet. App. A29. Rejecting petitioner's substantive challenges to the injunction, the court simply remanded the injunction for the district court to re-enter it in the form required by Fed. R. Civ. P. 65. *Id.*

5. This petition followed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for two reasons.

First, the circuits are irreconcilably divided on this important question of federal law. The Fourth Circuit, and

indeed respondents themselves, acknowledged that the Second, Third, and Ninth Circuits would permit petitioner to appeal the district court's approval of the settlement. This Court recently granted certiorari to resolve a closely related circuit split, but the Court divided evenly, leaving both conflicts unresolved.

Second, the decision below conflicts with this Court's precedents holding that "quasi-parties" – persons with a direct relationship to and interest in a district court judgment, who have a recognized right to participate in the case, and who do in fact participate – have standing to appeal. This Court's precedents also recognize that class members have a due process interest in having an avenue to appeal a settlement that directly affects their rights. The policy arguments underlying the decision below not only do not justify deviating from this precedent, but they are also flawed. For example, the panel majority did not account for the beneficial effect of objectors' appeals in deterring collusive class action settlements.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER OBJECTING CLASS MEMBERS HAVE STANDING TO APPEAL A CLASS ACTION SETTLEMENT.

The circuit conflict over whether an objecting class member has standing to appeal a district court's approval of a settlement is well recognized, entrenched, and outcome determinative. In rejecting petitioner's claim of standing, the Fourth Circuit avowedly refused to follow the longstanding precedent of the Second, Third, and Ninth Circuits, instead joining five other courts of appeals that had held to the contrary. Pet. App. A21. The trustees and the active subclass representative themselves acknowledged below that other circuits would have permitted petitioner to appeal. Holding that petitioner lacked standing, the panel majority refused to reach the merits of his appeal of the settlement. Pet. App. A23-A24.

The importance of the question is demonstrated by *Felzen* v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999). The Seventh Circuit in *Felzen* created a two-to-one circuit conflict on the narrower question whether an objecting shareholder has standing to appeal the settlement of a *derivative* action. The *Felzen* petition sought certiorari in substantial part on the ground that this Court's decision would help to resolve the broader conflict – now presented by this case – over the right of objectors to appeal settlements of non-derivative class actions. The Court granted certiorari but divided equally, leaving both conflicts unresolved.

As the court below recognized, three circuits allow objecting, non-named class members such as petitioner to appeal a district court's approval of a settlement. See Pet. App. A17 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49, 53 (CA2 1996) (allowing appeal if class member "objected to the proposed settlement at the Rule 23 hearing"); *Carlough* v. *Amchem Prods.*, 5 F.3d 707, 710 (CA3 1993) ("objecting class members will be able to appeal from any final order entered in the district court"); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (CA9 1977) (allowing appeal by non-named class members and stating that "[a]s members of the class, their legal rights are affected by the settlement and they have standing to sue")); see also *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (CA3 1993) (finding standing for a non-intervening shareholder to appeal settlement of a derivative suit when shareholder "attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal"); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1309 (CA9 1982) ("Whatever the rule may be with respect to treating class members as parties for certain procedural purposes, it is clear that class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment. * * * [A] class member may appeal from an

order approving a settlement to which the member objects."), *aff'd based on absence of a quorum*, 459 U.S. 1191 (1983).[3]

The Seventh Circuit would permit petitioner to appeal as well, although on a different basis. That court would hold that, although petitioner does not have standing to appeal as an objector, he does have standing to appeal as an *intervenor*. As the Fourth Circuit noted in this case, the Seventh Circuit in *Felzen* held that only named parties may appeal. More recently, however, the Seventh Circuit has held that objectors must be permitted to intervene, even late in the case, in order to confer upon them standing to appeal. *In re Synthroid Mktg. Litig.*, No. 00-3164, -- F.3d --, 2001 WL 1000713, at *2 (Aug. 31, 2001) (per Easterbrook, J.); *Crawford* v. *Equifax Payment Servs.*, 201 F.3d 877, 880-81 (2000) (per Easterbrook, J.). The Seventh Circuit specifically rejects the Fourth Circuit's rationale that such appeals should be prohibited because they will interfere with administration of the case. "The possibility that we would see merit to their appeal cannot be called 'prejudice'; appellate correction of a district court's errors is a benefit to the class. Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Crawford*, 201 F.3d at 881. Instead, the Seventh Circuit holds that, if necessary to avoid undue interference with the trial proceedings, the district court may "limit[] the extent of the intervenors' rights to objecting and, if necessary, appealing." *Id.*

The Fourth Circuit, by contrast, held that petitioner could not appeal either as an intervenor or as an objector. As the

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[3] In dicta, panels of the Ninth Circuit have stated that the question is an open one in that court, *Powers* v. *Eichen*, 229 F.3d 1249, 1253 (2000); *Zucker* v. *Occidental Petroleum Corp.*, 192 F.3d 1323, 1326 (1999), *cert. denied*, 529 U.S. 1066 (2000), notwithstanding the clear holdings of prior panels.

majority below explained, the Fifth, Sixth, Tenth, and Eleventh Circuits agree. Pet. App. A14-A17 (citing *Cook* v. *Powell Buick, Inc.*, 155 F.3d 758, 761 (CA5 1998); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (CA6 1994); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1008-09 (CA10 1993); *Guthrie* v. *Evans*, 815 F.2d 626, 628-29 (CA11 1987)); cf. *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35, 42 (CA1 2000) (in appeal of an injunction binding upon non-parties, court rejects Second Circuit's precedent finding standing and adopts instead approach of *Felzen*, *Shults*, and *Guthrie*).

Subsequent to this Court's equally divided affirmance in *Felzen*, the circuits have adhered to their conflicting positions. The split over objecting class members' standing to appeal thus continues in the derivative, class action, and other contexts. As the Second Circuit explained in *Kaplan* v. *Rand*, 192 F.3d 60, 67 (1999), "While the plaintiffs' attorneys urge us to adopt specifically the no-intervention, no-standing rule of the Seventh Circuit, see *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd sub nom California Pub. Employees' Retirement Sys.* v. *Felzen*, 525 U.S. 315, 119 S. Ct. 720, 142 L. Ed. 2d 766 (1999) (per curiam) (4-4 decision), we decline to do so." The Second Circuit then denied rehearing en banc without a single judge calling for a vote. Compare also *Agius* v. *Louisiana-Pacific Corp.*, 178 F.3d 1299 (table), No. 98-15641, 1999 WL 274521, at *1 & n.3 (CA9 Apr. 29, 1999) (unpub.) ("Our case law makes clear that because [the unnamed non-intervening class member] objected below he has standing to bring this appeal." (citing *Marshall* v. *Holiday Magic*, *supra*) (collecting cases reflecting circuit conflict)) with *In re Integra Realty Resources, Inc.*, No. 99-1344, -- F.3d --, 2001 WL 951332 (CA10 Aug. 21, 2001) (denying standing to appeal to unnamed defendant-class members who did not intervene); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 838 (CA7 1999) (unnamed class members must

intervene in order to appeal "because only parties may appeal from an order settling a class action").

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, UNDERMINES DUE PROCESS, AND RESTS ON FLAWED POLICY RATIONALES.

The district court's final judgment approving the settlement in this case has a substantial personal impact on petitioner, eliminating the 1991 COLA and binding him through res judicata. Because petitioner properly appeared in the district court and stated objections to the settlement, this Court's precedents deem him a "quasi-party" to the litigation with the concomitant right to appeal. Any doubt should be resolved in favor of holding that petitioner has standing to appeal in light of this Court's precedent recognizing the due process right of class members to protect their interests in class action litigation by contesting a proposed settlement. The Fourth Circuit's contrary holding rests entirely on policy arguments that are unmoored from this Court's decisions and are furthermore flawed. Among other things, the majority below failed to appreciate the substantial benefits of appeals by non-named class members, including their value in deterring collusive class action settlements among the named parties.

a. There is no question that respondents' settlement of this suit, approved by the district court over petitioner's objection, directly and substantially affects petitioner's personal interests. The settlement eliminates the COLA benefits that allow petitioner's pension to better keep up with inflation. Absent the settlement, petitioner could seek to enforce his right to the 1991 COLA in court.

The notice of the proposed settlement approved by the district court, however, advised petitioner that any objections to the settlement would be waived if not put forward at the court's fairness hearing. See *supra* at 5 n.1. Petitioner

properly filed objections and also appeared at the fairness hearing to press those objections.

When the district court nonetheless approved the settlement, the court's judgment became binding upon all of the class members, including petitioner, by operation of res judicata. See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). If there were any doubt about the preclusive effect of the settlement, it was emphatically put to rest when the new trustees successfully secured an injunction prohibiting any class member from making any court filing in any other jurisdiction that relates to the subject matter of the settlement.

b. The Fourth Circuit's decision that petitioner nonetheless may not appeal the settlement conflicts with this Court's precedents, which have recognized that standing to appeal exists not only for named parties but also for "quasi-parties" – *viz.*, persons who, like petitioner, are not named as formal parties to the litigation but (i) have a direct stake in the outcome, (ii) have a recognized right to participate in the case, and (iii) do in fact participate.

For example, in *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), Blossom had requested that the district court complete a foreclosure sale in which he had bid on the property, but the district court refused. When Blossom subsequently sought to appeal that ruling, the respondents objected that he was not a formal party to the case. This Court answered the question "[i]s the appellant so far a party to the original suit that he can appeal" in the affirmative, explaining that Blossom was entitled to appeal with respect to that part of the case in which he had properly participated. The Court found it clear that Blossom could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid." 68 U.S. (1 Wall.) at 655. But the Court found it equally "well settled, that after a decree adjudicating certain rights between the parties to a suit,

other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect." *Id.* at 655-56. The Court cited as examples appeals by "[s]ureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment," all of whom "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court." *Id.*

Subsequently, this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court but had not formally intervened. *Williams* v. *Morgan*, 111 U.S. 684 (1884). The Court cited *Blossom* and its progeny as sustaining quasi-parties' right "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." 111 U.S. at 699. The Court accordingly concluded that the objectors "had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700.[4]

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[4] *Blossom*'s progeny include *Hovey* v. *McDonald*, 109 U.S. 150, 155-56 (1883) (when non-party receiver received order in his favor, appeal could be brought against him); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1882) (trustees may appeal award in favor of complainant suing on behalf of a trust fund); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1878) (quasi-parties interested in order confirming a sale may appeal); *Hinckley* v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467, 469 (1877) (non-party receiver may appeal order directing him to pay money); and *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (appeal may be brought against persons who were "nominal parties" but not formal parties to the judgment).

Thus, in disagreeing with the panel majority in this case, Judge Michael was quite right to state that "[t]he rule that allows an unnamed class member to appeal a settlement order is rooted in early American equity jurisprudence." Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). See also *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (CA2 1934) (L. Hand, J.) ("[I]f the decree affects [a non-party's] interests, he is often allowed to appeal."). That remains the view of respected commentators. 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1797; 3B J. Moore, MOORE'S FEDERAL PRACTICE ¶ 23.80[5].

Under this Court's longstanding precedents recognizing the right of "quasi-parties" to appeal, petitioner is entitled to appeal the district court's approval of the settlement of this case. Petitioner has a direct stake in the settlement's elimination of the 1991 COLA, has a right under Fed. R. Civ. P. 23 to state objections to the proposed settlement, and did in fact properly put his objections forward. In fact, even the Fourth Circuit and respondents implicitly recognize the applicability of the "quasi-party" line of cases by not disputing that petitioner had the right to appeal from aspects of the district court's decision. For example, there has never been any question that petitioner had the right to appeal the district court's order enjoining the class members from making an court filing in any other jurisdiction that addresses the subject matter of the settlement. Nor has there been any question that petitioner had the right to appeal the denial of his motion to intervene. Petitioner plainly has standing to appeal those rulings because they affect him directly. But on that very same rationale, petitioner may appeal the district court's approval of the *settlement*, to which he has properly

objected, and which directly and profoundly affects his interests.[5]

If anything, petitioner's status as a "party" is far clearer than was true of the appellants in cases such as *Blossom* and *Williams*. Each member of the class in a class action is properly regarded as a "party," for each is fundamentally subject to the judgment as a matter of res judicata. See *supra* at 6, 15. To be sure, the Federal Rules of Civil Procedure do not require that each class member be named in the caption of the complaint. But that rule simply reflects the concern of modern civil procedure for ease of pleading and furthermore seeks to *benefit* class members by not requiring them to bear the costs of participating in the litigation. (Thus, the class members who are named defendants – here, respondents Debarr and Santoro – have that status not merely individually but in their capacity as representatives of the other class members. C.A. App. 345.) But the Fourth Circuit's rule perversely turns that benefit into an insurmountable burden on class members' ability to protect their rights by appealing.

c. Petitioner's standing to appeal is also supported by precedents recognizing that class members have a due process right to contest a settlement that may affect their interests. In *Phillips Petroleum Co.* v. *Shutts*, this Court held that the Fourteenth Amendment's Due Process Clause guarantees all class members the right to "receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." 472 U.S. at 811-12. See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class action must "afford [absent class members] an opportunity to present their objections"). Given the longstanding "due process 'principle of general application'"

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[5] Indeed, the decision of this Court cited by some circuits as supposedly prohibiting appeals by non-named class members expressly recognizes a non-party's right to appeal the denial of intervention. *Marino*, 484 U.S. at 304.

that only formal parties are bound by a judgment, this Court has concluded that the "burden of justification rests on [those seeking] the exception." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

Due process concerns are only heightened in the context of this defendant class action, for "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class." *Ortiz*, 527 U.S. at 846. Because the district court approved this class action under Fed. R. Civ. P. 23(b)(1), petitioner and the majority of retirees who object to the terms of the settlement were forbidden from opting out and litigating their interest in the dispute separately.[6] Furthermore, unlike plaintiff class actions suits, which are brought for the benefit of the members of a plaintiff class, a defendant class action like this suit is brought to *eliminate* a right held by each class member (here, the right to receive the 1991 COLA) by litigating against class representatives of their own choosing.[7]

Nor are the protections of the Due Process Clause limited to the right to state objections in the district court as opposed to on appeal. Although the Constitution does not mandate a right to an appeal, "it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court." Robert Leflar, INTERNAL OPERATING

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[6] Of note, if the new trustees had affirmatively sought a money judgment from the class members – as opposed to an order permitting them to eliminate the money that they would have received under the 1991 COLA – the Constitution likely would have prohibited the suit altogether. See *Shutts*, 472 U.S. at 812 & n.3 (at least in context of money judgment, due process generally requires that absent party "be provided with an opportunity to remove himself from the class").

[7] Indeed, the Union paid the attorney's fees of the defendant class representatives on an ongoing basis throughout the litigation, including prior to the settlement. Under the settlement, the Plan would reimburse the Union for those fees.

PROCEDURES OF APPELLATE COURTS 4 (1976). The right to appeal an adverse judgment is thus "a fundamental element of procedural fairness as generally understood in this country." ABA Comm. on Standards of Judicial Admin., STANDARDS RELATING TO APPELLATE COURTS § 3.10 cmt., at 18 (1994).

Indeed, a class member's due process interest in pursuing an appeal is at its apex in the context of a settlement. The premise of class action litigation at the district court level is that the named parties will represent the interests of the absent class members. But upon settlement, the named class representatives obviously will not appeal. Indeed, they almost invariably will be obligated to defend the settlement. "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan*, 192 F.3d at 67 (quoting *Bell Atl. Corp.*, 2 F.3d at 1310). On the Fourth Circuit's view, however, *no person* is permitted to protect the interests of objecting class members by appealing. In the context of this case, that result is fundamentally unfair not only to petitioner, but also to the majority of the members of the retiree class on behalf of whom he stated objections in the district court as the president of REPA.

It is no answer that objectors could intervene, then appeal on that basis. That is not a practical solution. Class members will undertake the costs of intervening – if ever – only once they receive notice of the proposed settlement, because it is only at that time that they will be able to determine whether the settlement is adverse to their interests. But under the Fourth Circuit's holding, a motion to intervene filed when the proposed settlement is disclosed to the class is properly denied as untimely. See Pet. App. A12-A13. Class members also may not intervene as a matter of right unless they can prove that the class representatives are inadequate, see Fed. R.

Civ. P. 24(a), which normally will not be the case before an inadequate settlement is disclosed.[8]

d. The Fourth Circuit's holding that non-named class members lack standing to appeal a district court's approval of a settlement rests not on any precedent of this Court, nor on an evaluation of the constitutional interests at stake, but rather on its perception of what rule would be best for class action litigation. Specifically, the majority below "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless" appeal the settlement. Pet. App. A21.

Even if the panel majority correctly understood the effect of its holding on class action litigation, its rationale would not justify prohibiting an otherwise proper appeal. No doubt, class actions – like all other suits – could be simplified if fewer appeals were allowed. Indeed, class actions would be far simpler if class members' right to state objections were eliminated altogether. But the Due Process Clause protects the right of objecting class members to pursue their interests, both in the district court and on appeal. Put another way, the question whether petitioner has "standing" to appeal the district court's approval of the settlement is not properly answered merely by determining what result would be most

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[8] Class members as a practical matter often may not know that the suit even *exists* until they receive the notice of the proposed settlement. Class members most often will lack the sophistication or financial interest in the case to retain counsel, file a complaint as an intervenor, and accept the resulting burdens of disclosure and discovery. Cf. *Shutts*, 472 U.S. at 809 (given small individual stakes, as a practical matter class members often would not incur costs of pursuing individual claims). In this very case, the district court determined that petitioner would not be an appropriate class representative because (*inter alia*) he did not have the resources to litigate the case in Maryland, far from the New York-New Jersey area where he and the other officers of REPA reside, and where he had already commenced class action litigation against the Union in the Southern District of New York.

expedient for litigating the case in the district court. Although deprivations of due process may often be expedient, they are not rendered any less unconstitutional as a result.

In any event, the majority below profoundly misunderstood the effect of permitting objectors to appeal a district court's approval of a class action settlement. Because an objector lacks the extensive rights of a party or a party-intervenor, he cannot in any sense usurp "the role of the class representative," Pet. App. A21. Rather than contesting the class representatives' conduct of the litigation, an objector can only contest the fairness or legality of the ultimate settlement.

This case illustrates the distinction perfectly. The district court denied petitioner's motion to intervene, and on that basis denied as moot petitioner's motions for discovery, for an injunction, and to disqualify class counsel, all of which rested on petitioner's putative status as a formal party. As an entirely separate matter, the district court rejected petitioner's objections to the *settlement* – for example, that it unlawfully eliminated an accrued benefit of the retiree subclass and that it unfairly failed to retain the COLA by requiring current employees to make pension contributions, just as retirees had in the past. Petitioner's appeal of the district court's approval of the settlement involves only the latter contentions, which do not involve the class representatives' conduct of the litigation.

If anything, the decision below will undermine orderly administration of class actions. Under the Fourth Circuit's rule, an objector must formally intervene early in the litigation in order to preserve for appeal any objections he may eventually have to a potential settlement of undefined terms that the named parties ultimately may or may not reach. District courts therefore will be burdened with unnecessary protective motions to intervene filed by class members who would otherwise await notice of a proposed settlement in order to determine whether they had any actual objections.

That result would undermine one of the principal advantages of class action litigation: avoiding the necessity for class members to become involved in the course of the litigation. See *Shutts*, 472 U.S. at 810 (benefit of class action is that "absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs.").

Conversely, when motions to intervene are denied, class members may file interlocutory appeals that burden the courts of appeals. Pet. App. A34. As Judge Michael explained in his dissent, class members normally may simply opt out in order to protect their interests (at least in class actions brought under Fed. R. Civ. P. 23(b)(3), which permits class members to opt out), or may institute collateral attacks against the class representatives challenging the adequacy of the representation they provided. Pet. App. A33. See Adv. Comm. Note, Fed. R. Civ. P. 24 (objectors "should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interests by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.").

e. Finally, the majority below failed to appreciate that a rule permitting objectors to appeal will deter collusive class action settlements and will thereby protect the interests of all class members. Accord *Bell Atl. Corp.* v. *Bolger*, 2 F.3d at 1310. The attorneys for the class representatives will be more likely to structure a settlement to benefit the entire class if they know that class members' objections will receive a thorough review, including on appeal if necessary.

In addition, the appeals process "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). The available data indicates that fairness hearings in district

courts tend to be exceedingly brief and generally do not result in changes to settlements crafted by the named parties. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995) (empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991).

Finally, objectors can play an important role on appeal in identifying flaws in a proposed settlement, and the courts of appeals' rulings can themselves provide important guidance for later cases. A prime example is this Court's seminal decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997) (holding that settlement-only class action must satisfy all requirements of Fed. R. Civ. P. 23). The *Amchem* respondents, who successfully challenged the named parties' settlement on appeal, were permitted to press their objections in the Third Circuit only because that circuit permits objectors to appeal.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 7, 2001

APPENDICES

APPENDIX A

United States Court of Appeals,

Fourth Circuit.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

v.

George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

and

Donald A. Bobo; R.I. Kilroy; F.T. Lynch; Frank Mazur, Defendants,

v.

Robert J. DEVLIN; Retired Employees Protective Association, Movants-Appellants,

and

A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

v.

George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

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A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Robert A. SCARDELLETTI; Frank Ferlin, Jr.; Joel Parker; Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan, Plaintiffs-Appellees,

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George Thomas DEBARR, Individually and as representatives of a class of all persons similarly situated; Anthony Santoro, Sr., Defendants-Appellees,

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and

A. Meaders; James H. Groskopf; Thomas C. Robinson; Doyle W. Beat; Miriam E. Parrish; Robert A. Parrish; Desmond Fraser; James L. Bailey; Dorothy Deerwester; Thomas J. Hewson; Clay B. Wolfe; Kenneth B. Lane; Brian A. Jones; Charles O. Swasy, Parties in Interest.

Nos. 99-2619, 00-1411, 00-1525.

Argued Oct. 31, 2000.

Decided July 27, 2001.

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, Chief District Judge. (CA-97-3464-FJM).

ARGUED: Arthur McKee Wisehart, Wisehart & Koch, New York, NY, for Appellants.

William Francis Hanrahan, Groom Law Group, Chartered, Barbara J. Kraft, Beins, Axelrod & Kraft, P.C., Washington, DC; Kenneth M. Johnson, Tuggle, Duggins & Meschan, P.A., Greensboro, NC, for Appellees.

ON BRIEF: Kahn, Smith & Collins, P.A., Baltimore, MD, for Appellants. Leonie Hassel, Groom Law Group, Chartered, Washington, DC, for Appellees Scardelletti, et al.

Before WILLIAMS and MICHAEL, Circuit Judges, and JOSEPH F. ANDERSON, JR., Chief United States District Judge for the District of South Carolina, sitting by designation.

OPINION

WILLIAMS, Circuit Judge:

Appellant Robert Devlin unsuccessfully sought to intervene to challenge a class action settlement in the United States District Court for the District of Maryland. Under the class settlement, the trustees (the new trustees)[1] of the Transportation Communications International Union Staff Retirement Plan (the Plan) and the named representatives of the

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[1] The new trustees are Appellees Robert Scardelletti, Frank Ferlin, Joel Parker, and Don Bujold.

class[2] agreed to the elimination of cost of living adjustment ("COLA") benefits that had been previously enacted by the Plan's former trustees[3] (former trustees) (we will refer to the appellees collectively as "the Trustees"). On appeal, Devlin asserts that he was entitled to intervene before the district court under Federal Rule of Civil Procedure 24(a) and (b) to challenge the settlement and that even if the district court properly denied his motion to intervene, he is nevertheless entitled to appeal from the district court's final order approving the settlement. Devlin also argues that the district court's injunction under the All Writs Act prohibiting him from collaterally attacking the settlement in another jurisdiction was improper under Federal Rule of Civil Procedure 65. We conclude that the district court did not err in denying Devlin's untimely motion to intervene and that Devlin, therefore, lacks standing to appeal the merits of the class action settlement. We reverse and remand the district court's All Writs Act injunction, however, so that the district court may articulate its reasons for issuing the injunction as required by Federal Rule of Civil Procedure 65.

I.

The Transportation Communications International Union (TCU) is a labor union representing approximately 85,000 employees, mostly in the railroad and service industries. The Plan is a defined benefits pension plan that covers TCU's officers and employees. In October 1990, the former trustees recommended that the Plan be amended to add a COLA adjustment equal to the increase in the COLA index for every three years after a participant's retirement. As a result of the

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[2] Appellee George Thomas Debarr is the named representative of the Active Subclass. Appellee Anthony Santoro is the named representative of the Retiree Subclass. Debarr and Santoro are parties both individually and as class representatives.

[3] The former trustees are Appellees Donald Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur.

amendment, which became effective on January 1, 1991, the existing retirees received increases in their pensions based upon the number of years they had been retired.

In late 1991, TCU elected new officers and selected the new trustees to replace the former trustees. In 1993, however, it was revealed that the former trustees had relied upon an incorrect valuation of the Plan's liabilities in deciding to enact the COLA amendment and that enactment of the COLA amendment had increased the Plan's liabilities by approximately $20 million. The new trustees believed that they could not rescind the COLA benefits across the board because, under ERISA, they were prohibited from amending the Plan to reduce accrued benefits. *See* 29 U.S.C.A. § 1054(g)(1) (providing that accrued benefits "may not be decreased by amendment of the plan").[4] Accordingly, they amended the Plan to "freeze the COLA as it pertain[ed] to the future service accrual for active employees," (J.A. at 3), thereby "eliminating COLA increases based on future service under the Plan." (Appellee's Br. at 11.) The amendment did not, however, eliminate the COLA benefits for participants who were retired as of January 1, 1991.

In January 1995, the new trustees filed suit against the former trustees in the United States District Court for the District of Maryland seeking damages and an equitable decree declaring the COLA amendment void as a product of fiduciary breaches.[5] *See Scardelletti* v. *Bobo*, 897 F.Supp. 913 (D.Md. 1995); *Scardelletti v. Bobo,* No. JFM-95-52 (D.Md.

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[4] 29 U.S.C.A. § 1054(g)(1) provides:

> (g) Decrease of accrued benefits through amendment of plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

[5] The new trustees requested "appropriate equitable relief" pursuant to ERISA § 502(a)(2) and (a)(3) for damages and to nullify the COLA amendment for all Plan participants.

Sept.8, 1997). The district court found in favor of the new trustees, agreeing that the former trustees had breached their fiduciary duties. The district court also concluded that the 1991 COLA benefit was not an accrued benefit for pre-1991 retirees such as Devlin because it had not been received prior to their retirement.[6] In accordance with the district court's decision, the new trustees amended the Plan and rescinded the COLA for participants who had retired prior to January 1, 1991 (the 1997 amendment).

On October 14, 1997, the new trustees filed the present action as a class action in anticipation of challenges to the 1997 amendment, seeking a declaration that the 1997 amendment was binding on all Plan participants or, in the alternative, that the 1991 COLA amendment was void as to all participants. The new trustees' original complaint named Devlin as a class representative for the Retiree Subclass because he previously had been active in challenging the new trustees' efforts to eliminate the COLA benefits. Devlin, however, refused to accept the position. The new trustees, therefore, named a new representative for the Retiree Subclass, Anthony Santoro.

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[6] The district court originally concluded that the COLA benefit was an accrued benefit for pre 1991 retirees. *See Scardelletti* v. *Bobo*, 897 F. Supp. 913, 916 (D.Md. 1995). As noted above, accrued benefits generally cannot be eliminated by amendments to the plan. *See* 29 U.S.C.A. § 1054(g)(1). The district court, with little elaboration and presumably relying upon § 1054(g), stated that "[u]nfortunately, the current trustees are caught between a rock and a hard place to remedy this situation because ERISA prohibits amendments of the Plan repealing an automatic COLA." *Bobo*, 897 F. Supp. at 916. It later reconsidered, however, stating that "if an employee works with the expectation that she is earning, and will receive, a pension benefit, an employer may not later decide not to give her the benefit that it has promised and she has earned. In the present case, Plan participants who retired prior to 1991 did not wo with the expectation that they would receive a COLA. Thus, the COLA was not an accrued benefit." *See Scardelletti v. Bobo,* No. JFM-95-52, at 18-19 (D.Md. Sept.8, 1997).

On February 9, 1999, the district court for the District of Maryland conditionally certified the class pursuant to Federal Rule of Civil Procedure 23(b)(1)[7] and divided it into two subclasses: those who would benefit from the removal of COLA (the Active Subclass), and those who would benefit from the retention of COLA (the Retiree Subclass). In May 1999, with the assistance of a magistrate judge, the new trustees and the class representatives agreed upon a settlement under which the COLA benefits would be eliminated in exchange for certain other benefits. Under the proposed settlement, it was agreed that the district court would enter a consent order declaring the 1991 COLA benefit void at its inception.

In the meantime, Devlin and four other retirees[8] were pursuing actions in the Southern District of New York alleging

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[7] Rule 23(b)(1) provides,

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests....

Fed.R.Civ.P. 23(b)(1).

[8] The four other retirees are Andrew Hagan, Thomas Hewson, Steven Milone, and Frederick Rinckwitz, who, along with Devlin, filed suit individually "and 'as agents on behalf of all' other retirees and their beneficiaries" against TCU. *Devlin* v. *Transportation Communications Int'l Union*, 173 F.3d 94, 97 (2d Cir. 1999). Hagan, Hewson, Milone, and Rinckwitz are not involved as individuals in the Maryland litigation, although Devlin moved to intervene on behalf of himself and the Retired Employees Protective Association (REPA).

claims under the ADEA and ERISA against TCU relating to their death benefits and medical benefits. They also included a claim relating to the 1997 Amendment, arguing that the 1997 Amendment was motivated by age discrimination. *See Devlin* v. *Transportation Communications Int'l Union*, 175 F.3d 121, 126 (2d Cir. 1999). On April 13, 1999, the Second Circuit affirmed the Southern District of New York's dismissal of Devlin's COLA claim, stating that "[t]he exact COLA issue that the appellants are pursuing ... is being addressed by the district court in Maryland.... It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue, given that that court already ruled that the amendment could be repealed as to those who retired prior to 1991, and that court is already entertaining a suit in which the legality of such a repeal is at issue." *Id.* at 132. The Second Circuit also noted that "though Devlin did not want to be the lead defendant in [the Maryland class action] because the case was pending in Maryland and Devlin was residing in the Northeast, the fact remains that Devlin and others in his position can be actively involved in the case." *Id.*

Shortly after the Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's challenge to the 1997 Amendment, Devlin became interested in the class action pending in the district court in Maryland. On April 20, 1999, Devlin's counsel sent a letter to the district court informally seeking to intervene in the class action. On May 12, 1999, Devlin sent another letter through counsel to the district court repeating his informal request to intervene and informing the district court that Devlin was "still await[ing] a response from Your Honor." (J.A. at 732.) For whatever reason, Devlin did not formally move to intervene, nor did he take any further action to follow up on these letters, until September 1999.

On August 27, 1999, the Trustees filed a motion for preliminary approval of the settlement in the District of Maryland. On September 10, 1999, Devlin finally sought leave to

intervene pursuant to Federal Rule of Civil Procedure 24(a) and (b).[9] At the November 12, 1999 fairness hearing, the district court denied Devlin's motion to intervene as "absolutely untimely." (J.A. at 2685.) It then examined the considerations leading to the settlement, heard Devlin's objections, and approved the settlement. Because Devlin was not a party, the district court also denied Devlin's motions for a preliminary injunction, to disqualify counsel, and to strike declarations. In approving the settlement, the district court declared the 1991 COLA Amendment "null and void as of its adoption and of no force or effect." (Supp. J.A. at 948.) On November 24, 1999, Devlin noted his appeal.

On January 4, 2000, Devlin, Hagan, Hewson, Milone, and Rinckwitz, individually and on behalf of REPA, filed a motion in the United States District Court for the Southern District of New York seeking to amend that court's earlier judgment because, they asserted, the District of Maryland erred in approving the settlement, refusing to allow Devlin to intervene, and foreclosing Devlin's right to sue for age discrimination. The Trustees responded by moving in the district court in Maryland to enjoin Devlin under the All Writs Act in an effort to dismiss the New York action and to prevent Devlin from interfering with the Maryland proceedings. On March 10, 2000, the district court in Maryland granted the injunction, concluding that Devlin's purpose in bringing the New York action was to interfere with the settlement.

Devlin raises several arguments on appeal. First, Devlin argues that the district court erred in denying his motion to intervene. Second, Devlin argues that he has standing to appeal from the district court's final order approving settlement even though he did not successfully intervene because he tried to intervene and objected to the settlement at the fairness hearing. Third, Devlin argues that the district court should not

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[9] Federal Rule of Civil Procedure 24(a) relates to intervention of right, and Rule 24(b) relates to permissive intervention.

have approved the settlement. Finally, Devlin argues that the district court's All Writs Act injunction prohibiting him from attacking the settlement in New York was improper under Federal Rule of Civil Procedure 65. We address each argument in turn.

II.

Devlin first argues that the district court erred in denying his motion to intervene. The district court denied Devlin's motion to intervene because it concluded that Devlin's attempt to intervene was "absolutely untimely" (J.A. at 2577) and that Devlin's interests were adequately represented by the Retiree Subclass representative, Santoro. We review the district court's denial of intervention for an abuse of discretion. *See Virginia* v. *Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976).

Devlin sought both intervention of right and permissive intervention. To intervene of right pursuant to Federal Rule of Civil Procedure 24(a), an applicant must satisfy all four of the following requirements: (1) the application must be timely; (2) the applicant must have an interest in the subject matter sufficient to merit intervention; (3) the denial of intervention would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation. *See* Fed.R.Civ.P. 24(a); *Houston General Ins. Co.* v. *Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Federal Rule of Civil Procedure 24(b), which addresses permissive intervention, provides that "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b). Under either Rule 24(a) or 24(b), the application for intervention must be timely. *See* Fed.R.Civ.P. 24(a) & (b) (requiring "timely application"); *Gould* v. *Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) ("Both intervention of right and permissive intervention require "timely application."); *see also Houston General*, 193 F.3d at 839 ("[T]imeliness is a cardinal consideration of whether to permit intervention." (internal quotation marks omitted)). Although Rule 24 "requires that the motion to intervene be 'timely,' ... it does not attempt to define the term or specify rigid time limits." *United States* v. *South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983); *see Black* v. *Central Motor Lines Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) (noting that "Rule 24 is silent as to what constitutes a timely application and the question must therefore be answered in each case by the exercise of the sound discretion of the court"). "The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *South Bend*, 710 F.2d at 396. To determine whether an application for intervention is timely, we examine the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene. *See Gould*, 883 F.2d at 286. Where intervention is of right, "the timeliness requirement of Rule 24 should not be as strictly enforced as in a case where intervention is only permissive." *Brink* v. *DaLesio*, 667 F.2d 420, 428 (4th Cir. 1981).

We cannot conclude, under any standard of timeliness, that the district court abused its discretion in concluding that Devlin's motion was untimely. Devlin was aware of his interest in the litigation from the outset of the case, as demonstrated by his early and continuous opposition to the removal of the COLA benefits. Nevertheless, instead of participating in the Maryland litigation, he pursued a separate suit in New York and even declined the role of named class representative in the Maryland suit. Only after the New York courts deferred to the Maryland court on the COLA issue did Devlin turn his attention to the Maryland case. At that point, Devlin still did not formally move to intervene. Although Devlin argues that he was not aware of his interest in the settlement until the notice of proposed settlement, Devlin's argument is belied by

his participation in the New York case, as well as by his letters, sent to the district court four months before his formal motion to intervene, that clearly indicate that he knew that his interests might be impacted by the proposed settlement. (*See* J.A. at 469 (Letter of April 20, 1999); J.A. at 731 (Letter of May 12, 1999)); *see Hill* v. *Western Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982) ("In a class action the critical issue with respect to timeliness is whether the proposed intervenor moved to intervene as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives." (internal quotation marks and alterations omitted)); *United States* v. *Pitney Bowes, Inc.*, 25 F.3d 66, 71, 74 (2d Cir. 1994) (affirming denial of intervention where intervenor had constructive knowledge of his interest for 15 months and actual knowledge for eight months); *cf. South Bend*, 710 F.2d at 396 (stating that prospective intervenor generally must move promptly for intervention as soon as he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation").

We also have no difficulty concluding that Devlin's inexplicable delay prejudiced the parties because, despite his longstanding awareness of his interest in intervening, Devlin waited until the settlement negotiations were complete before seeking formally to intervene. *See Hill*, 672 F.2d at 386 (stating that the "most important consideration (in passing on an application for intervention) is whether the delay has prejudiced the other parties" (internal quotation marks omitted)). Devlin's intervention at that point would have likely resulted in further delay and substantial additional litigation. As the district court noted: "If we went to another stage, another degree of complexity it might make it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it." (J.A. at 2784.) The district court also stated that "more delay wouldn't be to the benefit of the retiree subclass, particularly those who've retired before 1991 ... just more delay, more complexity would make it, might make it impossible ever to resolve this issue which cries for resolution." (J.A. at 2784.); *see County of Orange* v. *Air California*, 799 F.2d 535, 537-38 (9th Cir. 1986) (concluding that motion to intervene was untimely even though filed just two days after the parties notified the district court of proposed settlement because the district court concluded that allowing intervention might undo the resolution of protracted litigation). We agree with the district court that the threat of further delay and the prospect of complicated litigation, which, at that late date might have unraveled the settlement crafted by the parties, were sufficient bases from which to conclude that Devlin's untimely motion to intervene prejudiced the parties. In light of Devlin's delay in seeking to intervene, his lack of explanation for his extended delay, and the prejudice arising from the further delay that would necessarily have followed Devlin's intervention, we cannot conclude that the district court abused its discretion in finding Devlin's motion for intervention untimely.[10] Accordingly, we

[10] Devlin also argues that based upon his objections at the fairness hearing, the district court should have ordered discovery with respect to his argument that his interests were not adequately represented because class counsel and the class representatives had conflicts of interest. We have previously stated, however, in the context of objecting named plaintiffs who were appealing a class action settlement, that" [w]hile [the court] should extend to any objector to the settlement leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (internal quotation marks omitted). In other words, "[s]o long as the record before it is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Id.* (internal quotation marks and alterations omitted). In the present case, the district court thoroughly considered the fairness and adequacy of the settlement, and it had heard evidence not only in this case but from prior related cases as well. Thus, it

affirm the district court's denial of Devlin's motion to intervene.[11]

III.

We next address Devlin's challenge to the class settlement. As a threshold matter, we first must address whether Devlin has standing to challenge the merits of the settlement on appeal even though he failed successfully to intervene below. *See Coyne & Delany Co.* v. *Selman*, 98 F.3d 1457, 1464 n. 6 (4th Cir. 1996) ("Because the issue of standing ... is jurisdictional in nature, we decide it first.").

Devlin asserts that he has standing to challenge the settlement by virtue of his objections at the fairness hearing and his unsuccessful attempt to intervene. The Trustees argue that Devlin was not a named party to the action because he failed to intervene and therefore, he cannot appeal the merits of the settlement. Courts have divided on whether a class member who objects but is denied intervention has standing to appeal

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was informed as to the quality of representation, the issues at hand, and the concerns of the objecting participants. *Cf. In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 159 (4th Cir. 1991) ("Although this settlement was reached so early in the litigation that no formal discovery had occurred, the court found that documents filed by the plaintiffs and evidence obtained through informal discovery yielded sufficient undisputed facts to support the extent of JLI's insolvency and the difficulties plaintiffs would have in proving fraudulent intent under both federal and state securities laws.").

[11] Having concluded that the district court did not abuse its discretion in denying Devlin's motion to intervene, we also conclude that the district court did not err in denying as moot his motions for preliminary injunction, to strike evidence, and to disqualify counsel, which accompanied his motion to intervene. *See Retired Chicago Police Ass'n* v. *City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993) (noting in class action that "[t]he district court recognized that its denial of intervention mooted the putative interveners' other motions"); *cf. Houston General Ins. Co.* v. *Moore*, 193 F.3d 838, 839 (4th Cir. 1999) (affirming non-class-action case in which "[t]he district court denied Beaumont's motion to intervene, thus rendering the motion to vacate the underlying judgment moot").

the merits of the class action settlement. Some courts require successful intervention before a non-named class member may challenge the merits of a class settlement on appeal. *See Felzen* v. *Andreas*, 134 F.3d 873, 874-75 (7th Cir. 1998) (stating, in a shareholder case, that an attempt to intervene is not enough to confer standing and abrogating its former rule that class members and stockholders could appeal without intervening), *aff'd by equally divided Court*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999); *Cook* v. *Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998) (stating, in case where would-be intervenors appealed both the denial of intervention and the judgment approving the settlement, that "[i]t is well-settled ... that non-named class members of a certified class may not appeal the final judgment in a class action. Because the proposed intervenors were denied leave to intervene and, thus, never obtained the status of party litigants in this suit, we must dismiss their appeal as to all issues except the denial of their motion to intervene."); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1008-09 (10th Cir. 1993) (requiring actual party or intervener status for standing and stating that "[p]ermitting unnamed class members to pursue an appeal contrary to the wishes of the named class representatives would effectively substitute the unnamed members for the certified class representatives"); *see also Guthrie* v. *Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) (describing reasons that individual non-named class members should not have standing to appeal a final judgment binding on the class members).[12] As articu-

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[12] These courts also point to the Supreme Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). In *Marino*, the Supreme Court addressed in a non-class action whether police officers who were not parties could challenge a consent decree settling a Title VII lawsuit against the City of New York where the officers had objected to the settlement at the fairness hearing but had not moved to intervene either on appeal or before the district court. The Court affirmed the Court of Appeals for the Second Circuit's conclusion that "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the

lated by the Sixth Circuit, "a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal," although "a non-named class member has standing to

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consent decree approving that lawsuit's settlement." *Id.* at 304. In so holding, the Court reiterated the rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" and noted that "[t]he Court of Appeals suggested that there may be exceptions to this general rule, primarily when the nonparty has an interest that is affected by the trial court's judgment. *We think the better practice is for such a nonparty to seek intervention for purposes of appeal;* denials of such motions are, of course, appealable." *Id.* (internal quotation marks omitted and emphasis added).

The Seventh Circuit, in *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by equally divided Court*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999), reads *Marino* broadly to support its conclusion that a class member must formally become a party to appeal the final decision in derivative or class action litigation. *See id.* at 875-77. Neither the Tenth Circuit's decision in *Gottlieb* v. *Wiles*, 11 F.3d 1004 (10th Cir. 1993), nor the Eleventh Circuit's decision in *Guthrie* v. *Evans*, 815 F.2d 626 (11th Cir. 1987), relies upon *Marino;* rather, these courts rely upon practical policy concerns underlying Federal Rule of Civil Procedure 23 to conclude that successful intervention is a prerequisite to appellate standing. The Third Circuit has distinguished *Marino* on the grounds that *Marino* did not involve members of a class action who were objecting to a class settlement and that the plaintiffs in *Marino* had not attempted to intervene below, although they had objected to the consent decree at a hearing before the district court. *See Bell Atlantic Corp.* v. *Bolger*, 2 F.3d at 1307 (recognizing *Marino* 's holding that generally only parties may appeal but stating that "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise"); *cf. also Kaplan* v. *Rand*, 192 F.3d 60, 67-68 (2d Cir. 1999) (rejecting the Seventh Circuit's broad reading of *Marino* in *Felzen*); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) (recognizing that "*Marino* addressed the standing to appeal of non-parties and not ... of non- representative members of a class or derivative suit," but concluding that "*Marino* supports the notion that persons who are not proper parties should overcome *some additional hurdle* before attaining, for purposes of appeal, party status" (emphasis added)). We agree with those courts that have declined to apply *Marino* in the context of a non-named class member seeking to appeal from the final judgment in a class action.

appeal a settlement order if he has formally intervened in the action" or "if a motion to intervene, which is then appealed, should have been granted." *See Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994). Other courts, by contrast, broadly permit non-named class members to appeal the merits of a class settlement where they objected or tried to intervene below. *See In re PaineWebber Inc. Ltd. Partnerships Litigation*, 94 F.3d 49, 53 (2d Cir. 1996) (stating that individual non-named members of the class can appeal the district court's approval of the settlement as unfair "if they objected to the proposed settlement at the Rule 23 hearing"); *Carlough* v. *Amchem Prods.*, 5 F.3d 707, 710 (3d Cir. 1993) (stating that the district court's denial of a motion to intervene is not immediately appealable because "the objecting class members will be able to appeal from any final order entered in the district court"); *see also Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (stating that "[a]s members of the class, their legal rights are affected by the settlement and they have standing to sue"). We have not previously addressed this issue in a published decision.[13]

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[13] In the non-class action context, we have stated that

> persons who are neither original parties to, nor intervenors in, district court proceedings ordinarily may not appeal a judgment of the district court, [t]his rule ... is not without exception. For example, a person who [1] has an interest in the cause litigated and [2] has participated in the proceedings actively enough to make him privy to the record may appeal despite the fact that he was not named in the complaint and did not intervene.

Davis v. *Scott*, 176 F.3d 805, 807 (4th Cir. 1999) (internal quotation marks omitted). *But see Gottlieb* v. *Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993) (stating that because "Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments .... [c]ases addressing standing in other contexts are therefore inapplicable," including cases permitting non-parties in non- class actions to appeal where they have interests in the litigation).

Those courts that have required actual intervention as a prerequisite to standing generally have relied upon the following rationale, first articulated by the Eleventh Circuit in *Guthrie:*

> There are essentially three reasons for holding that individual, non-named, class members do not have standing to appeal a final judgment binding on the class members. First, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. Second, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. Third, class actions could become unmanageable and nonproductive if each member could individually decide to appeal.

Guthrie, 815 F.2d at 628. The Tenth Circuit in *Gottlieb* explained that

> Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments. To that end, the Rule elaborates comprehensive procedures to be followed in class actions. These procedures represent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class, factors not present in non-class action contexts.

Gottlieb, 11 F.3d at 1007 (internal citation omitted). In essence, these courts have reasoned that permitting non-named class members to appeal absent successful intervention fragments the class by allowing individual class members to relitigate the action without having to show that they are capable of fairly and adequately representing the class. *See id.* at 1008. These courts also note that "[s]ince a denial of a motion to intervene of right is immediately appealable, the interests of the unnamed class members are adequately protected." *Id.*

at 1008-09. Thus, "the policy underlying class actions under Rule 23 is best served by requiring an unnamed class member in a class action under Rule 23 to move formally to intervene and to be granted intervenor status in order to gain standing to appeal the adequacy of the settlement." *Gottlieb*, 11 F.3d at 1012. In sum, the formal intervention requirement is predicated upon concerns of adequate representation, avoiding fragmentation of the class, and the existence of adequate procedural protections.

Those courts that permit unnamed class members to appeal where they have objected below or unsuccessfully tried to intervene rely upon the rationale that "small claimants who could not litigate their claims absent the class action mechanism could be left with 'equally unpalatable alternatives--accept either nothing at all [by opting out] or a possible unfair settlement[by opting in but lacking standing to appeal].' " *Bell Atlantic,* 2 F.3d at 1309 (quoting *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971)).[14] Like-wise, these courts have been concerned with collective action problems and "agency costs":

> Frequently, in class or derivative litigation the number of clients is large and the individual injuries small (though, of course, when aggregated they can be and often are quite large). Courts and commentators have long recognized the "agency costs" inherent in class and derivative actions where the client, as principal, is neither well-situated nor adequately motivated to closely monitor and control the attorney, his agent. Shareholders with well- diversified portfolios or small holdings lack the incentive and information to police settlements--the costs

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[14] *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir.1993), addressed the question of appellate standing in a shareholder derivative suit. However, the Third Circuit assumed for the purposes of its analysis that the same "rules apply to objector appellate standing in class and derivative suits." *Id.* at 1307 n. 4.

> of policing typically outweigh any pro rata benefits to the shareholder.

Id. (internal footnotes omitted). These collective action and agency costs are exacerbated by informational constraints inherent in class actions, and, as a result, "[t]he effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process." *Id.* at 1310. Thus, "[t]he parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits." *Id.*[13] In sum,

> [g]iven the agency, collective action, and information problems inherent in settlements of derivative litigation, and the broad view of objector standing embodied in *Ace,* we conclude [that the non-named plaintiff who objected below] had standing to appeal the district court order approving the settlement. *Assuring fair and adequate settlements outweighs concerns that non-intervening objectors will render the representative litigation "unwieldy."* It is sufficient that [the non-named plaintiff] attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal.

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[13] The court in *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993), also pointed to the risk that

> plaintiffs' counsel and the defendants will structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation. Plaintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees. Such a risk cautions against creating obstacles to challenging derivative action settlement agreements.

Id. at 1310. In the present case, counsel were compensated on an hourly basis by the Plan and by TCU.

Id. (emphasis added).

A crucial difference between the approach of the majority of courts, as first articulated in *Guthrie,* and that of the minority of courts, as articulated in *Bell Atlantic,* is the way in which the courts balance class management concerns against fairness concerns. A majority of courts require successful intervention below as a prerequisite to appellate standing because they place a greater emphasis on the need for efficiency and effective class management, *see Gottlieb*, 11 F.3d at 1007 (relying upon the purpose of Rule 23 to "promote the efficient resolution of claims in cases involving multiple parties with similar claims"), whereas a minority of courts place a greater emphasis on the need to ensure the fairness and adequacy of class action settlements, *see Bell Atlantic,* 2 F.3d at 1309 (expressing concern that collective action and agency costs fail to ensure fair and adequate settlements).

We agree with the majority of courts that the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute "spoilers" who were not entitled to intervene below might unduly delay class settlement on appeal. We fail to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representatives and, in effect, act as intervenors by contesting the merits of the class settlement on appeal.

We also recognize, however, the importance of ensuring that non- named class members can appeal the merits of the class settlement where intervention was wrongfully denied below. With these competing concerns in mind, we believe that the best approach is that articulated by the Sixth Circuit in *Shults:*

> a non-named class member has standing to appeal a settlement order if he has formally intervened in the action (indeed, non-parties generally obtain such standing upon

> intervention). *However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted.* A nonnamed party may also have standing to appeal if the district court has otherwise "summoned" him into court. Of course, as the Supreme Court has indicated, "the better practice is ... to seek intervention for purposes of appeal." *Marino*, 484 U.S. at 304, 108 S.Ct. at 588. But a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal.

Shults, 35 F.3d at 1061 (emphasis added). We believe that this approach best balances the need to protect non-named class members against a wrongful denial of intervention below and the need to prevent nonmeritorious or untimely motions for intervention from unduly interfering with or delaying class settlement. We therefore hold that a non-named class member who unsuccessfully moves for intervention below may still have standing to appeal the substance of the class settlement if he was wrongfully denied intervention. But, where, as here, intervention was properly denied, the non-named class member does not have standing to contest the merits of the class settlement on appeal.[16]

The dissent posits that an unnamed class member who objects but fails successfully to intervene below should be able to appeal the approval of a class action settlement. While it is true that the settlement affects the unnamed class members'

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[16] Although the dissent argues that class members have standing to object to the settlement at the district court and that "[i]t is inconsistent with due process to deny the same class member standing to appeal the settlement order after he has exercised his right to object in district court," (Dissent, at 30), our decision does not deny standing to a non-intervenor who seeks to appeal the denial of a right to object to the settlement at the fairness hearing. *See supra*, note 10 (discussing Devlin's argument that the district court failed to order discovery to resolve his objection at the fairness hearing that his interests were not adequately represented).

interests, the purpose of securing class representatives is to ensure that the unnamed class members' interests are adequately protected. If the unnamed class member's interests are not adequately protected by the class representatives, the district court should grant the motion to intervene. Any unnamed class members whose interests were not adequately protected by the class representatives and who filed a motion to intervene that was wrongfully denied will be afforded the opportunity to appeal the class settlement. Thus, our rule strikes the appropriate balance between the dissent's concern over fairness to unnamed class members and concerns over efficiency and effective class management.

Additionally, merely requiring unnamed class members to object to the settlement as a prerequisite to their right to appeal does not adequately protect concerns about efficiency and effective class management because if the district court does not agree with the objections of the unnamed class members, it will proceed to approve the class settlement. Allowing appeals from each unnamed class member after approval of the class settlement implicates the precise management and efficiency concerns with which the class action system is concerned. Indeed, the facts of the present case provide an almost paradigmatic example of the "spoiler" effect that would follow from the minority view espoused by the Second, Third, and Ninth Circuits; here, Devlin sat on the sidelines while the class settlement was crafted, despite knowing for months that his interests were at stake. Devlin then objected and sought to intervene at nearly the last moment, at a point and time at which, as the district court recognized, acceptance of his objections "might [have] ma[de] it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it." (J.A. at 2784.) Accordingly, because the district court did not abuse its discretion in denying Devlin's untimely motion for intervention, Devlin does not have standing to challenge the merits

of the class settlement on appeal.[17]

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[17] We note that one of the bases for Devlin's challenge to the class settlement is his assertion that COLA benefits are accrued benefits that could not be eliminated by amendment without prior notice to and approval from the Secretary of Labor. *See* 29 U.S.C.A. § 1054(g)(1) (West 1999) (providing that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title"); 20 U.S.C.A. § 1082(c)(8) (West 1999) (providing that "[n]o amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment, or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment."). Because the Trustees did not follow this procedure, Devlin asserts that the settlement is void insofar as it is based upon illegal consideration. *See Collins* v. *Seafarer's Pension Trust*, 846 F.2d 936, 939 (4th Cir. 1988) ("[T]he failure to give adequate notice of the amendment and thus to trigger the requisite determination by the Secretary vitiates the effectiveness of the amendment.").

Although we do not decide this issue, we note that the nullification of the 1991 Amendment was ultimately not the product of the 1997 Amendment, but rather was the product of the district court's declaration that "[t]he amendment to the Plan ... providing for an automatic cost of living adjustment effective January 1, 1991 is null and void as of its adoption and of no force or effect." (Supp. J.A. at 948.) In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void.

We further note that it is at best unclear whether the 1991 COLA amendment constitutes an accrued benefit for participants such as Devlin who retired prior to the 1991 Amendment. Although the Seventh Circuit in *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), concluded that COLA benefits are accrued benefits, *id.* at 468, it did not address whether COLA benefits are accrued benefits with respect to plan participants who retired prior to the implementation of the COLA benefits. *Cf. Isby* v. *Bayh*, 75 F.3d 1191, 1196-97 (7th Cir. 1996) (stating that the court's focus in determining whether to accept a proposed settlement should be "upon the general principles governing approval of class action settlements" and that the court "must not decide unsettled legal questions" (internal quotation marks omitted)); *cf. also Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1976) (stating that the trial court should not transform the settlement hearing into "a trial or rehearsal for trial," nor should it "reach any dispositive conclusions on the admittedly unsettled legal issues in the case" (internal quotation marks omitted)).

IV.

Finally, Devlin argues that the district court erred in enjoining him from attacking the settlement in the Southern District of New York because it failed to follow the requirements of Fed.R.Civ.P. 65. Devlin also argues that the district court failed to require the Trustees to post a bond and that it impaired Devlin's right of access to the courts. In addition, Devlin asserts that his conduct in New York did not constitute a collateral attack against the settlement because the New York case did not relate to the proposed settlement. We review a district court's grant of a motion under the All Writs Act for an abuse of discretion. *See March* v. *Kittay*, 988 F.2d 498, 500 (4th Cir. 1993).

Under the All Writs Act, 28 U.S.C.A. § 1651(a), a federal court may enjoin parties before it "from attempting to relitigate decided issues and to prevent collateral attack of its judgments."[18] *March*, 988 F.2d at 500. Federal Rule of Civil Procedure 65(d) provides that "[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed.R.Civ.P. 65(d). "These terms are mandatory and must be observed in every instance." *Alberti* v. *Cruise*, 383 F.2d 268, 271-72 (4th Cir. 1967). "The

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[18] 28 U.S.C.A. § 1651 provides that

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C.A. § 1651 (West 1994).

specificity provisions of Rule 65(d) are no mere technical requirements." *CPC Int'l, Inc.* v. *Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000) (internal alterations and quotation marks omitted). Rather, Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. *Id.* "Moreover, without specificity, appellate review of an injunctive order is greatly complicated, if not made impossible. Rule 65(d) thus serves the twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review." *Id.*

In the present case, Devlin filed a motion to alter or amend in the Southern District of New York in which he alleged that the District of Maryland's refusal to allow him to intervene

> constitute[d] extraordinary circumstances that both were clearly erroneous and ... caused a manifest injustice to plaintiffs (a) by depriving plaintiffs of constitutional rights including due process rights, and the right of access to federal courts ... and (b) by depriving them of their right to litigate their age discrimination claims before a jury ... in a court of competent jurisdiction that is accessible and available to them, notwithstanding their limited financial resources, and by counsel of their own choosing.

(Supp. J.A. at 1040-41.) The district court granted the Trustee's motion under the All Writs Act, ordering Devlin "to dismiss the pending action in the Southern District of New York" and enjoining Devlin and "all members of the defendant class ... from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." (Supp. J.A. at 129-30.)

Devlin argues that the district court's All Writs Act injunction fails to satisfy Rule 65 because the injunction does not adequately set forth the reasons for its issuance.[19] We must determine, therefore, whether Rule 65 applies to an All Writs Act injunction issued in aid of the district court's jurisdiction. We conclude that it does; indeed, we have previously analyzed the two together in affirming a district court's issuance of an injunction, although we have not explicitly held that an All Writs Act injunction is invalid where it fails to satisfy Rule 65. *See March*, 988 F.2d at 500 ("[T]he district judge did not abuse her discretion, but rather acted within her authority under the All Writs Act ..., as well as, the Federal Rules of Civil Procedure, Rule 65."); *see also Florida Med. Assoc.* v. *U.S. Dept. of Health, Educ. & Welfare*, 601 F.2d 199, 202 (5th Cir. 1979) (stating that "the All Writs Act does

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[19] Relying upon *Hoechst Diafoil Co.* v. *Nan Ya Plastics Corp.*, 174 F.3d 411 (4th Cir. 1999), Devlin also argues that the injunction is defective because Rule 65(c) requires that the district court fix a bond when it grants an injunction. *See id.* at 421 (requiring that the "district court ... fix a bond whenever it grants a preliminary injunction or restraining order"). The district court did not require the Trustees to post a bond of any amount prior to issuing the injunction. However, the structure and plain text of Rule 65 make clear that the district court was not required to order the Trustees to post a bond pursuant to Rule 65(c). Although the title of Rule 65 applies generally to all injunctions, Rule 65(c) only applies to "restraining order[s]" and "preliminary injunction[s]." *Compare* Fed.R.Civ.P. 65(c) (providing that "[n]o *restraining order* or *preliminary injunction* shall issue except upon the giving of security by the applicant" (emphasis added)) *with* Fed.R.Civ.P. 65(d) ("*Every order* granting *an injunction* and *every restraining order* shall set forth the reasons for its issuance .... " (emphasis added)). Because Rule 65 clearly differentiates between preliminary injunctions and injunctions for purposes of Rule 65(c), and because this injunction does not qualify as a preliminary injunction, we conclude that the injunction is not subject to Rule 65(c)'s bond requirement. We further note if the district court were required to comply with Rule 65(c)'s bond requirement as a prerequisite to an All Writs Act injunction, its ability to protect its own jurisdiction would be tied to a party's ability to post a bond. As a result, the district court would be rendered powerless to protect its own jurisdiction where the party is unable to post a bond.

not free a district court from the restraints of Rule 65."); *Wood* v. *Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1525 (9th Cir. 1983) (finding that injunction against relitigation, issued under the All Writs Act, "is specific enough to satisfy the requirements of Federal Rule of Civil Procedure 65(d)"). *But see In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) ("While the issuance of the injunction here did not comply with the requirements that [Rule 65] prescribes for the issuance of preliminary injunctions, this is not a fatal defect."). The Fifth Circuit in *Florida Medical Association* explicitly concluded that Rule 65 applies to All Writs Act injunctions, reasoning that "[w]hile the All Writs Act empowers a district court to fashion extraordinary remedies when the need arises, it does not authorize a district court to promulgate an ad hoc procedural code whenever compliance with the Rules proves inconvenient.... Rule 65 provides sufficient protection for the jurisdiction of the district court." *Florida Med. Assoc.*, 601 F.2d at 202. In other words, the Fifth Circuit saw no reason to distinguish between All Writs Act injunctions and other injunctions that must comply with Rule 65. We agree. Notably, we have previously stated that Rule 65(d) "applies generally to equitable decrees compelling obedience under the threat of contempt." *See Skippy*, 214 F.3d at 459 (internal quotation marks and alterations omitted). This broad language informs our conclusion that Rule 65 applies to injunctions issued under the All Writs Act because an All Writs Act injunction, like any other injunction, compels obedience under the threat of contempt. An All Writs Act injunction likewise implicates the same twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review. *Id.*

Having concluded that Rule 65 applies to All Writs Act injunctions, we next must determine whether the district court's injunction in this case complies with Rule 65. Although we are reluctant to impose unnecessary obstacles on

the district court's ability to decisively protect its jurisdiction from collateral attack, particularly where, as here, it is clear that Devlin was seeking to undermine the district court's approval of the class settlement, we nevertheless conclude that the district court's injunction fails to satisfy Rule 65 because the injunction fails to set forth adequate reasons for its issuance.[20] We therefore remand the district court's injunction under the All Writs Act for further clarification.[21]

V.

In conclusion, the district court did not abuse its discretion in denying Devlin's motion to intervene, and, thus, Devlin does not have standing to contest the merits of the class settlement on appeal. We reverse and remand the district court's All Writs Act injunction prohibiting Devlin from attacking the settlement in another jurisdiction because the district court did not adequately set forth its reasons for the injunction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[20] The district court relied upon the conclusory statement that it is "upon finding that an injunction is necessary and appropriate in aid of this Court's jurisdiction." (Supp. J.A. at 129.) The district court did orally set forth its reasons at the hearing. (Supp. J.A. at 938-41 ("The case in New York right now is absolutely an attack on this litigation and the settlement. It is not simply a derivative case seeking to increase assets of the plan.").)

[21] Devlin also argues that the district court improperly impaired his access to the courts. We note, however, that the injunction explicitly leaves Devlin the option of pursuing an action in the District of Maryland, and he is not precluded from litigating in any court any matter not connected with this litigation. Thus, we fail to see how the district court has improperly impaired Devlin's access to the court system. Likewise, although Devlin argues that his post-injunction motion, filed five days after the injunction, was not an attack on the settlement, his post- injunction motion clearly invites the Southern District of New York to undermine the basis for the District of Maryland's approval of the settlement. We have no difficulty concluding that Devlin's motion was an attack on the District of Maryland's judgment.

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

The only fair rule gives the right of appeal to an unnamed class member who objects to a settlement in district court. This rule, which is steeped in tradition and followed in three of our circuits, does not burden the class action system. I therefore respectfully disagree with the majority's decision, stated in part III of its opinion, that an objecting class member who does not intervene lacks standing to appeal a settlement order. Nevertheless, because I otherwise agree with the majority, I concur in the judgment and in parts I, II, and IV of the court's opinion.

I.

An unnamed class member has the right to object in district court to a proposed class action settlement. *See Gould* v. *Alleco*, 883 F.2d 281, 284 (4th Cir. 1989); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797, at 376 (2d ed.1998). Typically, the unnamed class member may file written objections and appear at the fairness hearing to contest the reasonableness of the proposed settlement. *See* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.56, at 11-139 (3d ed.1992). Although a district court has considerable leeway in controlling the course and scope of fairness proceedings, an objector is generally entitled "to be heard, to examine witnesses and to submit evidence on the fairness of the settlement." *Flinn* v. *FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). The rights of an unnamed class member who objects to a settlement should not be cut off as he walks out the door of the district court. Indeed, better reasoned precedent holds that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement. *See In re PaineWebber, Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (2d Cir. 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977); *see also* 7B Wright et al., *supra*, § 1797, at 360-61 ("Of course, if the

class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment."). The rule that allows an unnamed class member to appeal a settlement order is rooted in early American equity jurisprudence. Under the old equity rules, cases could be brought by representative parties: when "parties are exceedingly numerous, and it would be impracticable to join them ... the court will not insist upon their being made parties; but will dispense with them, and proceed to a decree." Joseph Story, *Commentaries on Equity Pleadings* § 94 (10th ed. 1892). And, those "who are not directly made parties" have the right to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." *Id.* § 96. In other words, if an unnamed party was bound by the decree, he had the right to take an appeal. Today, it is still fair and efficient to allow an unnamed class member to appeal an order approving a class settlement, as long as he has presented his objections in district court.

First, the unnamed class member's legal rights are affected by the order approving the settlement. This gives the class member standing to object to the settlement in district court. *See Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (holding that an unnamed class member has a due process right to object at the fairness hearing). It is inconsistent with due process to deny the same class member standing to appeal the settlement order after he has exercised his right to object in district court. *Cf. Philips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985) (noting that an unnamed class member has a due process right "to be heard and participate in [class action] litigation" in state court).

Second, the unnamed class member, as a prerequisite for appeal, must state his objections to the settlement in district court. The class representatives and the defendants thus face potential appeals only from those unnamed class members

whose objections are denied in district court. In most instances an objector will have little incentive to appeal because the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a settlement after considering the objector's concerns.

Third, affording unnamed class member-objectors the right to appeal serves to encourage fair settlements in class action cases. As the Third Circuit has said, class actions present the risk that

> [p]laintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees.... The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. In seeking court approval of their settlement proposal, plaintiffs' attorneys' and the defendants' interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits.

Bell Atl. v. Bolger, 2 F.2d 1304, 1310 (3d Cir.1993) (footnote and citations omitted). Moreover, when everyone involved--the class representatives, the defendants, the lawyers, and even the trial judge--knows that an objector has the right to appeal, it stands to reason that a settlement proposal will be designed and scrutinized with more care.

Fourth, we have not been presented with any evidence that objector appeals have gummed up the works in the circuits (the Second, Third, and Ninth) where they are expressly allowed. Class action litigation is plenteous in the district courts in these circuits, and there is no indication that the circuit courts have been faced with an unmanageable avalanche of appeals by objectors to class action settlements. Nor is there any indication that plaintiffs are reluctant to become class representatives or that plaintiffs' lawyers are reluctant to file class actions because unnamed, objecting class members have the right to appeal. In short, the objector appeal right does not appear to be causing the class management and fragmentation problems that worry the majority.

Fifth, the rule authorizing objector appeals actually promotes efficiency in the class action system. For example, the unnamed Rule 23(b)(3) class member who knows he has the right to appeal is less likely to opt out of the class because he will have the opportunity, after objecting, to appeal any settlement order he regards as unfair. In addition, the availability of appellate review of the denial of a class member's objections will lessen the possibility of collateral attacks on settlement orders. *See, e.g., Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (5th Cir. 1988) (recognizing that unnamed class members may "challenge the adequacy of class representation ... by filing a separate lawsuit for that purpose"). With the right to appeal in place, a disgruntled class member will have more incentive to pursue his objections in the core action instead of waiting to launch a collateral attack on the judgment in separate litigation.

Finally, the majority's approach--requiring an unnamed class member to formally intervene before he can appeal--is unduly burdensome to class members and creates its own inefficiencies. As the majority notes, an intervention application must be timely. *See* Fed.R.Civ.P. 24(a). Yet the majority fails to recognize that most unnamed class members receive very little information about their case as it goes along. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L.Rev. 1, 20 (1991). Indeed, most unnamed class members do not realize that they might have an objection until they re-

ceive notice of the fairness hearing at the end of the litigation. This lack of information makes it difficult for unnamed class members to make timely decisions to seek intervention in an effort to protect their interests. The intervention requirement also has the potential to waste judicial resources, and it will not lead to quicker resolution of cases. The intervention requirement will place more work on the district courts who will have to deal with motions to intervene in addition to the fairness proceedings. Of course, if intervention motions are denied, the unnamed class members will be able to appeal the denials. The intervention alternative adopted by the majority therefore does nothing to take care of its concern about "delay[ing] class settlement on appeal." *Ante* at 21. At bottom, the majority's approach forces costly intervention motions, creates more work for the district courts, produces about the same amount of work for the court of appeals, and delays final resolution without providing any meaningful benefit. On the other hand, a rule that allows objecting, unnamed class members to appeal keeps the focus strictly on the merits, that is, whether the settlement is fair and reasonable.

I firmly but respectfully disagree with the majority's intervention requirement that denies appeal rights to unnamed class members. Giving unnamed, objecting class members the right to appellate review is much better insurance against unfair class action settlements. The latter approach appears to be working in three of our busiest circuits, and it will work here, too.

II.

I now turn to how I would deal with Robert Devlin's appeal, which is before us. The district court denied his motion to intervene as untimely, and I (like the majority) would affirm that ruling. I, of course, disagree with the majority's decision that Devlin lacks standing to appeal the order approving the settlement agreement. Because Devlin filed objections to the proposed settlement in the fairness proceedings, I would hold that he has standing to appeal. Nevertheless, after

considering the merits, I would affirm the district court's order approving the settlement. As the majority points out, the "district court thoroughly considered the fairness and adequacy of the settlement," *ante* at 14 n. 10, giving careful consideration to Devlin's objections. Devlin objected to the settlement because it nullified the 1991 COLA amendment. The COLA amendment had the effect of substantially increasing benefits to participants who retired before January 1, 1991. Because the removal of the COLA reduced the retirement benefits of pre-1991 retirees, Devlin argued that the settlement was unfair in that it adversely affected the pre-1991 retiree subclass. The district court found, however, that restoration of the COLA would jeopardize the viability of the retirement plan and would compromise the interests of the pre-1991 retiree subclass and the active subclass. The court concluded that Devlin's position "was absolutely destructive of everybody's rights and interests" and would "steer the ship onto the rocks." A review of the record of the fairness proceedings reveals that the district court fully analyzed the proposed settlement for fairness and adequacy in accordance with the *Jiffy Lube* factors. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). The district court's decision to approve the settlement was well within its discretion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

ORDER

Upon consideration of the cross-motion of Robert J. Devlin, filed on September 10, 1999, to intervene as a party to this action pursuant to Fed. R. Civ. P. 24(a) and (b), the motion is denied for the reasons stated in open court on November 12, 1999, during the hearing on the fairness and adequacy of the proposed settlement of this action.

Upon consideration of the motions for other relief contained in the cross-motion, those motions are denied as moot.

Upon consideration of the motions for a preliminary injunction and for other relief filed by Robert J. Devlin on November 12, 1999, the motions are denied as moot.

Dated: March 15, 2000

/s/
J. Frederick Motz
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

FINAL ORDER

This matter having come before the Court on the motion of the plaintiffs for approval of the settlement set forth in the Settlement Agreement and Release ("Settlement Agreement"), and the responses of the Defendant Class thereto, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed and good cause appearing therefore, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. For purposes of settlement, the Defendant Class is defined to consist of all active, terminated vested and retired participants in the Transportation Communications International Union Staff Retirement Plan ("Plan") and their beneficiaries, except R.A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Howard Randolph, Mitchell M. Kraus, Donald A. Bobo, R.I. Kilroy, F.T. Lynch and Frank Mazur; and the Defendant Class is divided into a Retiree Subclass made up of all members of the Defendant Class who retired or terminated

service under the Plan prior to January 1, 1999, and their beneficiaries; and an Active Subclass, made up of all members of the Defendant Class who had not retired or terminated service under the Plan prior to January 1, 1999, and their beneficiaries.

2. The requirements to certify a class under Rule 23(b)(1) of the Federal Rules of Civil Procedure for purposes of settlement have been satisfied and the Defendant Class is certified for settlement purposes under Rule 23(b)(1) of the Federal Rules of Civil Procedure.

3. The notice given to the Defendant Class concerning the Settlement Agreement provided fair and reasonable notice to the Defendant Class of the nature of this action, the proposed settlement, and the right to appear and be heard concerning the proposed settlement and satisfied the order of this Court concerning notice to the Defendant Class and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

4. The Settlement Agreement is approved and is, in all respects, fair, reasonable and adequate to the Defendant Class and all of its members in accordance with Rule 23 of the Federal Rules of Civil Procedure and was negotiated and entered into in good faith.

5. The amendment to the Plan adopted October 13, 1990 providing for an automatic cost of living adjustment effective January 1, 1991 is null and void as of its adoption and of no force or effect and Article 5.5(a) of the Plan document Restated to Reflect All Amendments Adopted Through March 3, 1999 is null and void and shall not be enforced.

6. Without affecting the finality of this Order, the Court retains jurisdiction over implementation and enforcement of the Settlement Agreement.

7. This action is dismissed with prejudice.

Dated: March 15, 2000

/s/
J. Frederick Motz
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. JFM-97-3464
ANTHONY SANTORO, SR., et al.	)	
Defendants.	)	

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on the motion of Plaintiff Trustees for a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Upon consideration of the motion, the memorandum in support thereof, and the opposition thereto, and upon finding that an injunction is necessary and appropriate in aid of this Court's jurisdiction, it is hereby

ORDERED, that he motion is GRANTED, and it is further

ORDERED that Messrs. Devlin, Hagan, Hewson and Rinckwitz, and REPA, are hereby enjoined to dismiss the pending action in the Southern District of New York captioned Devlin, et al. v. Scardelletti, et al., No. 00 Civ. 43 (S.D.N.Y.); and it is further

ORDERED, that Devlin, Hagan, Hewson, Rinckwitz and REPA, as well as all members of the defendant class, are enjoined from making any filing in any forum against any per-

No. 01-417

Supreme Court, U.S.
FILED
NOV 7 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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November 7, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The question presented is whether an unnamed class member whose motion to intervene was properly denied as untimely has standing to appeal from an order approving the settlement of a class action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASON FOR DENYING THE WRIT	11
I. THIS COURT'S RESOLUTION OF THE STANDING ISSUE WOULD NOT AFFECT THE FINAL OUTCOME IN THIS CASE. THE COURT SHOULD NOT EXPEND ITS RESOURCES ON A QUESTION OF NO PRACTICAL IMPORTANCE TO THE LITIGANTS	11
II. THE CONFLICT AMONG THE CIRCUITS OVER AN UNNAMED CLASS MEMBER'S STANDING TO APPEAL FROM THE APPROVAL OF A SETTLEMENT IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT	13
CONCLUSION	18

TABLE OF AUTHORITIES

CASE	Page
Bellas v. CBS, Inc., 221 F.3d 517, (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001)	3
In re Brand Name Prescription Drugs Antitrust Lit., 115 F.3d 456 (7th Cir. 1997)	15
Carlough v. Amchem Prods., 5 F.3d 707 (3d Cir. 1993)	8
Cook v. Powell Buick, Inc., 155 F.3d 758 (5th Cir. 1998)	8
Crawford v. Equifax Payment Services, Inc., 201 F.3d 877 (7th Cir. 2000)	16
Devlin v. Transportation Communications International Union, No. 95 CIV 10838 (S.D.N.Y. 1995)	4
Devlin v. Transportation Communications International Union, 175 F.3d 121 (2d Cir. 1999)	5, 6
Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999)	8
Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975) *cert. denied*, 424 U.S. 967 (1976)	12
Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)	8
Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987)	8
Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977)	8
The Monrosa v. Carbon Black Export, 359 U.S. 180 (1959)	11
In re PaineWebber Inc. Ltd. Partnerships Litigation, 94 F.3d 49 (2d Cir. 1996)	8
Research Corporation v. Asgrow Seed Company, 425 F.2d 1059 (7th Cir. 1970)	15
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	11

TABLE OF AUTHORITIES—Continued

	Page
Scardelletti v. Bobo, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498, (D. Md. Sept. 8, 1997)	2, 4
Shults v. Champion Int'l Corp., 35 F.3d 1056 (6th Cir. 1994)	8
In re Synthroid Marketing Litigation, 264 F.3d 712 (7th Cir. 2001)	16
Ticor Title Insurance Co. v. Brown, 511 U.S. 117 (1994)	11
In re VMS Ltd. Partnership Securities Lit., 976 F.2d 362 (7th Cir. 1992)	15

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et. seq*	3
ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)	3
ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1)	2
ERISA § 404, 29 U.S.C. § 1104	3
28 U.S.C. § 1651	7

IN THE

Supreme Court of the United States

No. 01-417

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

This defendant class action involves a defined benefit pension plan (the "plan") maintained by the Transportation Communications International Union (the "TCU" or the "union") for the benefit of the employees of the union. In late 1990, the then-serving senior officers of the union, who also served as the trustees of the plan and were participants in the plan, procured the approval by the union's governing body of a plan amendment that provided for massive increases in benefits keyed to increases in the Consumer Price Index. Pet. App. A4. In recommending this cost of living adjustment ("COLA"), the plan's trustees assured the union's governing body that the plan's actuary had conducted a thorough actuarial study that confirmed that the COLA benefits could

be adopted without increasing TCU's contributions to the plan. Based on this advice, the TCU's governing body, known as the Executive Council, adopted, effective January 1, 1991, an amendment (the "COLA amendment") providing for retrospective and prospective increases of up to 10% for each three year period following a participant's retirement. *Scardelletti v. Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498, *6-7 (D. Md. Sept. 8, 1997).

The officer-trustees who recommended the adoption of the COLA amendment then retired. Two years later, newly elected officers of the union discovered that the COLA amendment had resulted in a 50% increase in the plan's liabilities for benefits and would require massive contribution increases that would rapidly lead to the union's bankruptcy. *Id.* at *8. The newly elected officers also discovered that the former trustees' recommendation of the adoption of the COLA amendment was not supported by any actuarial study. In fact, the plan's then-serving actuary had consistently advised against the adoption of far more modest COLA provisions because the cost of funding such increases was "prohibitive." *Id.* at *22.

Realizing that funding the COLA benefit would bankrupt the union, TCU adopted a series of amendments to reduce funding costs. Principally, the TCU cut the benefit accrual rate in half for active employees and increased the normal retirement age by two years. C.A. App. 2550-51. TCU believed, however, that it could not attack the COLA amendment directly because it appeared that the benefits granted by the COLA amendment were "accrued" benefits that could not be reduced by a voluntary plan amendment. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1).[1] Consequently,

[1] "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in § 302(c)(8) or 4281." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). ERISA unhelpfully defines the term "accrued benefit" to mean "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age . . ." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). What benefits fall within this tautological definition and are therefore protected by section 204(g)'s anticutback rule has been the subject of much litigation that has produced no clear answer. *See, e.g., Bellas v. CBS, Inc.*, 221 F.3d 517, 526-28 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001).

even the drastic cutbacks in future benefit accruals, which fell entirely on the shoulders of active employees, were not sufficient to lower the plan's overall funding requirements to a level that the union could support. C.A. App. 2549-50.

The currently serving trustees of the plan then brought an action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et. seq.*, against the former trustees for breach of fiduciary duty. The United States District Court for the District of Maryland granted partial summary judgment in favor of the current trustees, concluding that the former trustees had breached their duties under section 404 of ERISA, 29 U.S.C. § 1104, by recommending the adoption of the COLA amendment without conducting any serious inquiry into the costs of funding this benefit increase. The court then set the question of damages for trial.

A crucial issue on summary judgment in the action against the former trustees was whether the COLA amendment could be repealed by a subsequent amendment. The district court ruled that at least for persons who retired before the COLA amendment took effect, the COLA benefit was not an accrued benefit and therefore could be eliminated by a plan amendment without violating ERISA's anticutback provision. Pet. App. A6.

Guided by the court's interlocutory ruling, the TCU's Executive Council immediately adopted an amendment to the plan to eliminate the COLA for pre-1991 retirees, but left the

COLA amendment in place for persons who had continued to work after 1990. These post-COLA amendment active employees appeared, under the district court's reasoning, to have a protected accrued benefit under the COLA amendment because they performed work after receiving an explicit promise that they would earn the COLA benefit. Pre-1991 retirees, in contrast, had never had such a promise while they were working. *Scardelletti v. Bobo*, 1997 U.S. Dist. LEXIS 14498, *32-33.

This benefit reduction, made in response to an interlocutory order of the court, raised the prospect of multiple lawsuits by disappointed retirees challenging the validity of the COLA elimination amendment. The plan's trustees therefore filed this action seeking a declaration that the amendment eliminating the COLA was binding on the pre-1991 retirees and a declaration that the original COLA amendment was void as to all participants in the plan because it was procured by a fiduciary breach. The trustees named petitioner Robert J. Devlin, a retiree, and George Thomas DeBarr, an active employee, as defendants and representatives of a class consisting of all participants in the plan.

The trustees named Devlin as a class representative because since September 1995, he had been prosecuting a putative class action against TCU and the trustees in the Southern District of New York that, among other claims, challenged the propriety of the trustees' efforts to eliminate the COLA amendment in their fiduciary breach action against the former trustees. *Devlin v. Transportation Communications International Union*, No. 95 CIV 10838 (S.D.N.Y. 1995).[2] However, contrary to his allegations in the New York

[2] The Southern District of New York eventually dismissed this action and Devlin appealed. The United States Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's COLA-related claim and remanded another, unrelated claim for further proceedings. Noting the District of Maryland's lengthy involvement in the present litigation, the Second Circuit observed that "[i]t seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue . . ." *Devlin v. Transportation Communications International Union*, 175 F.3d 121, 132 (2d Cir. 1999).

action, Devlin represented to the Maryland court that he was incapable of representing the class because he did not have the resources or the desire to do so. C.A. App. 539, 554-56. The Maryland court acknowledged that Devlin was a "natural defendant in the action here," who had been selected by the trustees "for reasons which nobody can ever call collusive." The court was concerned, however, that Devlin might not be able to provide vigorous representation on behalf of the class. C.A. App. 556. The trustees therefore agreed to dismiss Devlin as a defendant and name a new representative for retired participants to provide the "vigorous representation on these issues" that the court expected. C.A. App. 556-57.

The trustees named a new defendant to represent the retired segment of the class. On February 9, 1999, the court entered a conditional order certifying a class and dividing the class into two subclasses. Pet. App. A7.

Because the relevant facts had been fully developed in the preceding action against the former trustees, the parties to the present action were able to engage in informed settlement discussions at a relatively early stage. These settlement discussions eventually reached impasse, and the court appointed a magistrate judge to supervise further discussions. Throughout the course of settlement negotiations, Devlin communicated extensively with counsel for the retiree subclass and received periodic reports on the status of negotiations and the terms under discussion. Devlin repeatedly expressed his objections to any idea of settlement, and advanced specific criticisms of the terms of various proposals and the manner in which the retiree subclass counsel was conducting herself. C.A. App. 525-35.

On April 13, 1999, the Second Circuit issued its decision affirming the dismissal of Devlin's COLA-related claim in the New York action. *Devlin v. Transportation Communications International Union,* 175 F.3d 121. One week later, Devlin advised the District of Maryland by letter of his intention to file a motion to intervene in the Maryland action. C.A. App. 469. A few weeks later he submitted a second letter again stating his intention to intervene. C.A. App. 731. He took no further action for the next four months. Pet. App. A8.

In May 1999, the parties reached a settlement. On August 27, 1999, the plan's trustees moved for preliminary approval of the settlement, approval of a notice to the class, and for the scheduling of a fairness hearing. Pet. App. A8

On September 10, 1999, Devlin finally acted on his plan to intervene and filed a motion generally objecting to any preliminary approval of the settlement and seeking leave to intervene as a party. Pet. App. A8-9. On September 14, 1999, the district court gave preliminary approval to the settlement and authorized the mailing of the notice to the approximately 700 class members. The district court reserved a ruling on Devlin's motion to intervene until the fairness hearing on November 12, 1999.

At the hearing, the court denied the motion to intervene as "absolutely untimely" and denied a series of additional motions that Devlin had filed the morning of the hearing. Pet. App. A9. The court then heard Devlin's objections to the settlement and considered 23 other written objections, 22 of which echoed Devlin's stated views that the settlement was unfair to retirees. The other members of the 700-member class voiced no objection to the settlement. At the conclusion of the hearing, the court expressed its views on the terms of the settlement and stated that it would approve the settlement. As the court summed it up, "the bottom line is that this settlement not only is extremely fair, it is a testament to

the best of the best of what the law profession with the assistance of other professions can achieve. . . . And so this settlement is in my judgment . . . supremely fair and . . . I have absolutely no hesitancy in approving [it]." C.A. App. 2676-77.

Under the terms of the settlement, the COLA amendment was declared void from its inception as to all plan participants. In exchange, most retirees were promised that their benefits would be increased by 10.5%. For active employees, the benefit accrual rate, which had been cut in half once the COLA problem came to light, would be restored to its original level. Their normal retirement age, however, would remain at the higher age that had been imposed as part of the cost-cutting effort. TCU also promised that it would continue to fund the plan at a rate that the parties expected would be well in excess of ERISA's statutory minimum funding requirements. The settlement also provides that none of these benefit improvements will take place until all challenges to the approval of the settlement have been resolved. C.A. App. 1827-35.

Devlin appealed the denial of his motion to intervene and the approval of the settlement agreement to the United States Court of Appeals for the Fourth Circuit.[3] Agreeing with the district court, the court of appeals first observed that "[w]e cannot conclude, under any standard of timeliness, that the

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[3] Devlin also appealed a separate order entered under the All Writs Act, 28 U.S.C. § 1651, restraining him and others acting in concert with him from pursuing a collateral attack on the settlement that he and four other retirees filed in the United States District Court for the Southern District of New York. Although the court of appeals rejected most of Devlin's arguments concerning the All Writs injunction, it agreed with him that Rule 65 applies to such injunctions and that the district court failed to reduce its reasons for issuing the injunction to writing, as required by the Rule. The court of appeals therefore remanded the All Writs injunction to the trial court for "further clarification." Pet. App. A29.

district court abused its discretion in concluding that Devlin's motion [to intervene] was untimely." Pet. App. A11. The court of appeals pointed to Devlin's 1995 lawsuit in the Southern District of New York opposing the efforts to eliminate the COLA, his declining to serve as a class representative in the Maryland action, and his letters to the district court months before he formally moved to intervene as demonstrating that he was fully aware, at an early stage, "that his interests might be impacted by the proposed settlement." Pet. App. A12. The court of appeals also agreed with the district court that "the threat of further delay and the prospect of complicated litigation, which, at that late date might have unraveled the settlement crafted by the parties, were sufficient bases from which to conclude that Devlin's untimely motion to intervene prejudiced the parties." Pet. App. A13.

Turning to Devlin's appeal from the order approving the settlement, the panel divided. The panel majority focused on his standing as an unnamed objecting member of the class to appeal on the merits. After surveying the decisions in the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits holding that an unnamed class member does not have standing to appeal,[4] and the decisions in the Second, Third, and Ninth Circuits holding that an unnamed class member does have standing to appeal,[5] the panel majority joined the majority of circuits and ruled that an unnamed class member does not

[4] *Cook v. Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994); *Felzen v. Andreas*, 134 F.3d 873, 874-75 (7th Cir. 1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999); *Gottlieb v. Wiles*, 11 F.3d 1004, 1008-09 (10th Cir. 1993); *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987).

[5] *In re PaineWebber Inc. Ltd. Partnerships Litigation*, 94 F.3d 49, 53 (2d Cir. 1996); *Carlough v. Amchem Prods.*, 5 F.3d 707, 710 (3d Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977).

have standing to appeal from an order approving the settlement of a class action. Pet. App. A15-17. The court majority made it clear that where an unnamed class member unsuccessfully moves to intervene, the class member can simultaneously appeal both the denial of intervention and the approval of the settlement. If the appellate court then concludes that the denial of intervention was error, it can proceed directly to the merits issues concerning the settlement. "We believe that [the Sixth Circuit's] approach best balances the need to protect non-named class members against a wrongful denial of intervention below and the need to prevent nonmeritorious or untimely motions for intervention from unduly interfering with or delaying class settlement." Pet. App. A22.

In so ruling, the court focused on "the practical policy considerations of Federal Rule of Civil Procedure 23" and the detrimental effect on the class action process of allowing unnamed class members to fragment the control of class actions by appealing without any examination of their ability to fairly represent the class. Pet. App. A16 n.12. In the court's view, the competing concerns for the efficient management of class actions and for individual fairness are best balanced by requiring class members who might wish to appeal from a settlement to intervene formally in the action. The intervention requirement "weighs strongly in favor of limiting the possibility that last minute 'spoilers' . . . might unduly delay class settlement on appeal." Pet. App. A21. Because the majority concluded that Devlin's motion to intervene was properly denied "under any standard of timeliness," the majority ruled that he lacked standing to appeal. The majority therefore did not issue a dispositive ruling on the merits of the approval of the settlement. Pet. App. A24 n.17.

One member of the court concurred in the judgment but disagreed with the majority's view on standing. In the con-

curring judge's view, the balance between efficiency and fairness weighed in favor of allowing unnamed class members who appear and present objections to a settlement to appeal from an order approving the settlement. Pet. App. 30-31. Moreover, in the concurring judge's view, a rule granting standing to objecting class members would not overburden the class action system, but instead would promote certain efficiencies in the process. Pet. App. A31.

Although disagreeing with the majority on the standing question, the concurring judge agreed that the district court had properly denied Devlin's motion to intervene. Pet. App. A35. But because the concurring judge believed that the court should have reached the merits of Devlin's appeal, the judge addressed the question whether the district court had properly exercised its discretion to approve the settlement. "As the majority points out, the 'district court thoroughly considered the fairness and adequacy of the settlement,' *ante* at [Pet. App. A13 n.10], giving careful consideration to Devlin's objections. . . . The [district] court concluded that Devlin's position 'was absolutely destructive of everybody's rights and interests' and would 'steer the ship onto the rocks.' A review of the record of the fairness proceedings reveals that the district court fully analyzed the proposed settlement for fairness and adequacy . . . The district court's decision to approve the settlement was well within its discretion." Pet. App. A35 (internal citation omitted). Consequently, the concurring judge concurred in the court's judgment.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S RESOLUTION OF THE STANDING ISSUE WOULD NOT AFFECT THE FINAL OUTCOME IN THIS CASE. THE COURT SHOULD NOT EXPEND ITS RESOURCES ON A QUESTION OF NO PRACTICAL IMPORTANCE TO THE LITIGANTS.

This Court has repeatedly observed that it does not sit to render advisory opinions on abstract questions of law. *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 123 (1994) (". . . as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants."); *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here . . . can await a day when the issue is posed less abstractly."); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.").

The majority and concurring opinions below leave no real doubt that should this Court grant review and conclude that unnamed class members have standing to appeal from an order approving a class action settlement, the ruling would have no practical effect on the final disposition of this controversy. The concurring judge was quite explicit: the district court was well within its discretion in approving this settlement. Pet. App. A35. The majority opinion left little doubt that if the majority had occasion to decide the merits, it would have reached the same conclusion as the concurring

judge. Indeed, the concurring judge began his discussion of the merits by quoting a passage of the majority opinion recounting the district court's careful inquiry into the merits of the settlement. Pet. App. A35.

The majority's views on the fairness and the adequacy of the settlement are not difficult to deduce. At the conclusion of its discussion of the standing issue, the majority appended a lengthy footnote addressing in some detail each of Devlin's objections to the settlement. Pet. App. A24 n.17. At the core of his objections were three propositions: (1) The COLA amendment provided an accrued benefit to all members of the class; (2) by virtue of ERISA's anticutback provision, the COLA benefits could not be eliminated by a plan amendment, except under one limited circumstance authorized by ERISA section 302(c)(8), 29 U.S.C. § 1082(c)(8); (3) TCU had not used the section 302(c)(8) procedure when it adopted the plan amendment repealing the COLA provision.

As to the first point, the majority noted that "it is at best unclear whether the 1991 COLA amendment constitutes an accrued benefit for participants such as Devlin . . ." The majority then observed that in considering whether a settlement should be approved, the district court should not turn the settlement hearing into "'a trial or rehearsal for trial,' nor should it 'reach any dispositive conclusions on the admittedly unsettled legal issues in the case.'" Pet. App. A24 n.17 (*quoting Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). Addressing the next two points, the majority noted that "[a]lthough we do not decide this issue, we note that the nullification of the 1991 Amendment was ultimately not the product of the 1997 Amendment, but rather was the product of the district court's declaration . . . . In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void." Pet. App. A24 n.17. In short, while the

majority refrained from making a dispositive ruling on the merits of Devlin's objections to the settlement, the majority made it clear that it viewed those objections as devoid of merit.

Given the clearly signaled posture of the court of appeals, it is abundantly clear that this Court should not engage in an exploration of a theoretical question of appellate jurisdiction that will have no practical impact on the final outcome of this controversy.[6]

II. THE CONFLICT AMONG THE CIRCUITS OVER AN UNNAMED CLASS MEMBER'S STANDING TO APPEAL FROM THE APPROVAL OF A SETTLEMENT IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

The courts of appeals that have addressed the issue are in general agreement on one point: the question whether an unnamed class member has standing to appeal involves striking a balance between the interests of efficient and coherent management of class actions and the interests of individual fairness to members of a class. *See* Pet.

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[6] Granting the petition would have one real practical consequence adverse to the interests of the group on whose behalf Devlin purports to speak. The benefit increases promised to retirees under the settlement, some of which will be retroactive to January 1, 1999, cannot go into effect until all proceedings are concluded and the district court's judgment is no longer subject to further judicial review. The more than 400 hundred members of the retiree subclass are thus being deprived of the benefits of the settlement while this case remains under review. So far, more than 40 of them have died while this matter has been pending. Similarly, some members of the active subclass have retired since the settlement was approved nearly two years ago. Their monthly benefits are being paid at a reduced level until such time as the settlement is final. The only real-world effect that review by this Court would have on the litigants is to delay their receipt of the benefits of the settlement.

App. 14-18. Ordinarily, these kinds of questions, which frequently arise in connection with intervention motions and class certification decisions, are addressed by the district courts on a case by case basis guided by general principles that can be tailored to the facts of the particular case. The district courts are thus able to conduct their important litigation management functions in a flexible fashion with an eye toward both efficiency and justice.

Unusually, the balancing of efficiency and fairness presented in the opinion below arises in the rarified air of appellate jurisdiction. And although the question presented goes to the jurisdiction of the appellate courts, at bottom it is nothing more than a question concerning case management. In the six circuits that now require unnamed class members to seek leave in the district court to intervene in order to perfect their right to appeal from the approval of a settlement, the circuits have made a judgment that the district courts can perform a valuable screening function to protect the class and the court system "by limiting the possibility that last-minute 'spoilers' . . . might unduly delay class settlement on appeal." Pet. App. A21. Three circuits have struck a different balance, and assign the screening function to themselves, expressed through their decisions on the merits of the class member's appeal.

Two things are apparent from this state of affairs. First, in none of the circuit courts is an unnamed class member absolutely foreclosed from appealing a decision that may adversely affect the class member's interests. In the majority circuits, an unnamed class member who has colorable grounds "to usurp the role of the class representatives," Pet. App. A21, need only assume the relatively minor burden of filing a timely intervention motion. If the district court erroneously denies intervention, the appellate court can correct the error and address the merits. In the minority circuits, the unnamed class member is relieved of this burden,

but must still convince the appellate court that his concerns warrant reversal of the order approving settlement. But in all nine of these circuits, any unnamed class member with a meritorious point has an opportunity to persuade the courts that his contentions merit relief.

Second, the question of standing to appeal ultimately involves nothing more than whether the appellate courts will undertake the obligation of managing the appellate aspects of class action litigation by themselves, or whether they will assign part of that function to the district courts. Like nearly all litigation management questions, this one benefits from the opportunity to experiment with different approaches and gain a perspective on the best way to deal with the issue. It may be the case, as the concurring judge below believed, that there is no evidence that "objector appeals have gummed up the works in the circuits (the Second, Third, and Ninth) where they are expressly allowed." Pet. App. A32. If that is true, the minority rule may do no substantial harm.

The experience of the Seventh Circuit suggests otherwise. The Seventh Circuit was an early adopter of the rule that an unnamed class member has standing to appeal. *Research Corporation v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (7th Cir. 1970). However, the court moved away from this position in stages, first deciding that an unnamed class member did not have standing to appeal from a post-settlement order implementing the settlement, *In re VMS Ltd. Partnership Securities Lit.*, 976 F.2d 362, 368 (7th Cir. 1992), and then deciding that an unnamed class member must intervene to have standing to appeal from an order approving a settlement. *In re Brand Name Prescription Drugs Antitrust Lit.*, 115 F.3d 456, 458 (7th Cir. 1997) ("Any contrary implication of *Research Corp v. Asgrow Seed Co.* . . . can no longer be considered authoritative in light of *VMS*.") (internal citation omitted).

More recently, the Seventh Circuit has addressed the standards that should apply to an unnamed class member's motion to intervene to perfect standing to appeal from an order approving a settlement. The court began with the proposition that "[o]nly when the class members suspect that the representative is not acting in their best interests is there a need to intervene. . . . Unnamed members of the class *rarely* will suspect a shortfall in the adequacy of representation before learning of the terms of a (potentially inadequate) settlement . . ." *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 880-81 (7th Cir. 2000) (emphasis added). Consequently, "[a]s a rule the time for unnamed members of the class to intervene can not commence until notice under Rule 23 . . ." *Id.* at 881. With these principles in mind, the court readily reversed an order denying intervention as untimely where the unnamed class members did not have sufficiently timely notice that the settlement would impact their interests to allow them to intervene at an earlier stage of the litigation. *Id.*; *In re Synthroid Marketing Litigation*, 264 F.3d 712, 715 (7th Cir. 2001) (same).

Petitioner appears to suggest that the rule adopted by the majority opinion below somehow completely forecloses an unnamed class member from appealing a class settlement. "The Fourth Circuit, by contrast, held that petitioner could not appeal either as an intervenor or as an objector." Pet. 13. In fact, however, the rule actually adopted by the majority merely illustrates the efficacy of allowing the district court to screen unnamed class members' efforts to position themselves to appeal. Here, Devlin had been aware since 1995, when he brought his first action in the Southern District of New York designed to preserve the COLA amendment, of his interest in and his objections to the subject matter of the present litigation. Certainly, his interest was crystallized when he was named in 1997 as a class representative in this action. After he was dismissed as a party at his own insistence, he kept himself informed of the progress of the

litigation and of the status of settlement talks by continually communicating with counsel for the retiree subclass. Then, months before the parties reached a settlement, he twice announced his intention to intervene but took no action until a signed settlement agreement was on file. As the majority described it, "Devlin sat on the sidelines while the class settlement was crafted, despite knowing for months that his interests were at stake." Pet. App. A23. There is small wonder that all members of the court below agreed that his motion to intervene was "absolutely untimely," especially when their review of his objections to the settlement failed to find any merit whatsoever to his opposition to the settlement.

Much of the information about Devlin's maneuvers became a matter of record in this litigation only because he filed a motion to intervene, which the district court was obliged to address on the merits and the court of appeals was required to review. In those circuits following the minority rule that an unnamed class member has standing to appeal as a matter of right, the court of appeals would have been less well informed of the circumstances underlying Devlin's objections, and consequently less able to evaluate those objections. The facts of this particular case aptly illustrate the wisdom of assigning a screening function to the district courts to assist in the management of the appellate aspects of class action settlements.

As the Seventh Circuit's developing jurisprudence on unnamed class member standing to appeal demonstrates, the circuit courts are fully capable of assessing their experience with this rule of case management and adjusting their views as necessary. The circuit split on this point is simply an opportunity for the courts to measure the practical utility of differing approaches. For litigants, the only important consideration is knowing which rule will apply in their cases. No fundamental rights are endangered by either the majority or minority rules. Meritorious appeals will receive full

consideration under either rule. Unmeritorious appeals, like the present one, will be rejected under either rule. But it is extremely doubtful that even in those circuits that require intervention as a precondition to appellate standing, the courts of appeals will routinely uphold denials of motions to intervene while bemoaning their inability to address meritorious objections to flawed settlements.

The question of class action case management of the appellate dockets presented here is best left to the circuit courts to resolve in light of their developing experience. The circuit split on the point is not one that this Court needs to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR THE PETITIONER

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY FOR THE PETITIONER 1
I. Petitioner Is Not Seeking An "Advisory" Opinion. 2
II. The Question Presented Is Vitally Important. 6
CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

Amchem Products, Inc. v. *Windsor*, 521 U.S. 591 (1997)..... 7

Belcher v. *Stengel*, 429 U.S. 118 (1976) (per curiam)..... 5

Crawford v. *Equifax Payment Servs., Inc.*, 201 F.3d 877 (CA7 2000)..... 7, 9

Felzen v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999)..... 7

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768 (CA3), *cert. denied*, 516 U.S. 824 (1995)..... 8

In re Synthroid Mktg. Litig., 264 F.3d 712 (CA7 2001)..... 7, 9

Order of Nov. 8, 2001, No. 01-408, *Holmes Group, Inc.* v. *Vornado Air Circulation Sys.*, *cert. granted* Nov. 8, 2001..... 2

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955)..... 4, 5

Rudolph v. *United States*, 370 U.S. 269 (1962) (per curiam)..... 5

The Monrosa v. *Carbon Black Export*, 359 U.S. 180 (1959)..... 5

Ticor Title Insurance Co. v. *Brown*, 511 U.S. 117 (1994) (per curiam)..... 5

Other Authorities

Robert L. Stern et al., Supreme Court Practice (7th ed. 1993)..... 4

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REPLY FOR THE PETITIONER

Respondents freely admit here, just as they did below, that this case squarely presents and perfectly illustrates the entrenched circuit conflict over whether non-named class members may appeal a class action settlement. BIO 8 & nn.4-5. Respondents furthermore do not dispute that the decision below cannot be reconciled with this Court's precedents holding (i) that the Fourteenth Amendment's Due Process Clause protects a class member's right to appeal (see Pet. 19-22), and (ii) that so-called "quasi parties" in petitioner's position have standing to appeal (*id.* 16-19). Indeed, respondents do not dispute for a moment that the majority rule in the circuits that the Fourth Circuit adopted in this case simply makes no sense on its own terms: petitioner is a member of the certified class in this case and thus plainly *is* a "party" to this litigation, as evidenced by the fact that the

district court entered an injunction against him on the basis of the settlement; petitioner thus plainly has the right to appeal. See *id.* 18-19.

Having thereby conceded the essential elements of this Court's certiorari inquiry, respondents are reduced to arguing that any ruling by this Court would be "advisory" (BIO 11-13) and that the question presented is not sufficiently important to warrant this Court's attention (*id.* 13-18). Neither argument is persuasive.

I. Petitioner Is Not Seeking An "Advisory" Opinion.

This petition presents a live case or controversy meriting review in this Court because the Fourth Circuit held that petitioner lacked standing to appeal "[a]s a threshold matter" (Pet. App. A14) and avowedly left the merits of the case unresolved. Respondents' argument that footnote seventeen of the panel majority's opinion effectively decided the merits is facially absurd. That footnote could not be clearer: "*we do not decide this issue*." Pet. App. A24 n.17 (emphasis added).

Respondents nonetheless contend that they are confident they will prevail on remand. Their bravado, however, falls far short of rendering this Court's ruling on the question presented by this petition "advisory." If this Court grants petitioner the relief he seeks – a holding that he has standing to appeal – the case will be remanded for disposition on the merits. The fact that the court of appeals might later rule for respondents is immaterial. Cf. Order of Nov. 8, 2001, No. 01-408, *Holmes Group, Inc.* v. *Vornado Air Circulation Sys.*, *cert. granted* Nov. 8, 2001 (granting certiorari to consider whether jurisdiction properly rested with Federal Circuit or instead regional circuit, notwithstanding that Federal Circuit panel's reasoning on the merits of the case would presumably be adopted by the regional circuit on remand if the petitioner prevailed).

Respondents' confidence that they will win on remand is, moreover, entirely misplaced, for their statement that footnote seventeen "address[ed] in some detail each of Devlin's objections to the settlement" (BIO 12) is, once again, a flat misstatement of what the court did. As that footnote explains in its very first sentence, the panel majority avowedly discussed only "*one* of the bases for Devlin's challenge to the class settlement" – *viz.*, "that COLA benefits are accrued benefits that could not be eliminated by amendment without prior notice to and approval from the Secretary of Labor." Pet. App. A24 n.17 (emphasis added). The majority did not so much as mention, for example, petitioner's argument that the settlement was unfair because it did not require active employees to make pension contributions that retirees had made for many years. See Pet. 5. And although respondents make much of the fact that the concurring judge in this case concluded that the district court "was well within its discretion" in approving the settlement as fair (BIO 11 (citing Pet. App. A35)), the much more salient point is that the *majority* did not address the settlement's fairness.

Even as to the one argument addressed by the panel majority – regarding which, as noted, it took care to make clear "we do not decide" (Pet. App. A24 n.17) – the court acknowledged that the correct rule of law "is at best unclear." *Id.* Respondents themselves concede that the law is totally unsettled: "What benefits fall within this tautological definition and are therefore protected by section 204(g)'s anticutback rule has been the subject of much litigation that has produced no clear answer." BIO 3 n.1. It is also noteworthy that the Scardelletti respondents (*i.e.*, the plaintiff-trustees) originally took *petitioner's* position in the district court, arguing that "the benefits granted by the COLA amendment were 'accrued' benefits that could not be reduced by a voluntary plan amendment." *Id.* 2.

The Fourth Circuit's passing dictum casting doubt on this one aspect of petitioner's appeal, moreover, will benefit from

further consideration on remand. The majority below suggested that, even if ERISA prohibited a pension plan from making the plan amendment in this case, a district court might still be able to approve the same amendment: "In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void." Pet. App. A24 n.17. But that reasoning would make the relevant ERISA provision a nullity, for it would always permit plan administrators (as in this case) to secure declaratory judgments from federal district courts permitting them to enact otherwise unlawful plan amendments. Congress could not have intended that result.

The decisions cited by respondents (BIO 11) for the proposition that this petition seeks an advisory ruling are accordingly entirely dissimilar from this case, which is presumably why the brief in opposition lifts quotes from them out of context without any further explanation. In truth, respondents seem to have taken these citations largely from page 172 of the *Stern & Gressman* treatise, where they are properly cited for propositions that have nothing to do with this case. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.4, at 172 (7th ed. 1993) (citing *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 (1955), for the proposition that, "[i]f the statute upon which the controversy rests has expired or been amended in a manner which will prevent the problem from arising in the future, certiorari may be denied despite a square conflict"); *id.* (citing *The Monrosa* v. *Carbon Black Export*, 359 U.S. 180, 184 (1959), for the proposition that "[i]f it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon

which there is conflict, the conflict itself may not be sufficient reason for granting review").[1]

---

[1] Thus, the Court DIG'ed *Rice* v. *Sioux City Memorial Park Cemetery* because an intervening state statute "bar[red] the ultimate question presented in this case from arising again in that State," such that the Court concluded that the case did not satisfy its rule that certiorari was appropriate "where a state court has decided a federal question of substance not theretofore determined by this court." 349 U.S. 70, 73 (1955). "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* at 74. *Rice* thus stands for the proposition, inapposite here, that certiorari is inappropriate where the Court's decision "would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 269 (1962) (per curiam).

The Court DIG'ed *The Monrosa* v. *Carbon Black Export* because it concluded after briefing and argument that the particular contract before it did not implicate the circuit conflict asserted by the petition for certiorari: "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." 359 U.S. 180, 184 (1959). *The Monrosa* is accordingly regularly cited for the proposition, inapposite here, that "[n]ow that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered, we have concluded that the writ should be dismissed as improvidently granted." *Belcher* v. *Stengel*, 429 U.S. 118, 119-20 (1976) (per curiam).

Finally, the Court DIG'ed *Ticor Title Insurance Co.* v. *Brown*, in part because "[o]n the day we granted certiorari we were informed that the parties had reached a settlement designed to moot the petition, which now awaits the approval of the District Court," which led the Court to conclude that "as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants." 511 U.S. 117, 122 (1994) (per curiam). This case does not implicate *Ticor*'s holding.

Respondents' remaining contention – that this Court's consideration of this case would "delay [the retirees'] receipt of the benefits of the settlement" (BIO 6 n.13) – is, to be blunt, outrageous. The settlement restores a portion of the retirees' COLA benefits that the trustees revoked in violation of ERISA. Most relevant here, it was *respondents* – *i.e.*, the plaintiff-trustees and the defendant class representatives whom they hand-picked – who designed the terms of the settlement, including a provision mandating that if even a single retiree appealed, no class member would receive any benefits until that appeal was totally concluded. (As the petition explained (at 20 n.7), the plaintiffs have conveniently been paying all the attorney's fees of the class representatives throughout the case.) The only function of this provision is to strong-arm class members into abandoning their objections. Indeed, petitioner purposefully filed his petition for certiorari well before the statutory deadline and requested in writing that respondents revise the settlement to disburse some benefits to retirees while his appeal is pending; respondents categorically refused. It is hard to imagine a better illustration of why it is essential that this Court address the question presented and hold that settlements do not extinguish objectors' right to appeal.

II. The Question Presented Is Vitally Important.

As an alternative ground for denying certiorari, respondents suggest that the question presented is not important enough to warrant this Court's attention. Objectively, that is not correct. As the petition explained, this Court recently granted certiorari to decide the very similar question whether objectors to a derivative-action settlement have standing to appeal. *Felzen* v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999). For two reasons, the grounds for granting certiorari are even more substantial here: (i) the circuit conflict in *Felzen* was substantially narrower

(only two-to-one); and (ii) the conflict presented here arises in all class actions, not merely derivative suits. See Pet. 12.

Of note, respondents do not dispute that the question whether an objecting class member has the ability to appeal is vitally important. The appellant's right to due process is at stake. So, too, is the proper disposition of innumerable class actions. As the petition explained, class action settlements are frequently collusive and approved by district judges upon only brief consideration. See Pet. 24-25. The prospect of an appeal puts greater pressure on the litigants and the district judge to enter into a lawful and equitable settlement. It was an objector's appeal that led to this Court's seminal decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). See also, *e.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 715, 722-23 (CA7 2001) (reversing denial of post-settlement motions to intervene and partially reversing order approving settlement); *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (CA7 2000) (reversing denial of post-certification motion to intervene and then reversing approval of settlement); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 778-79 (CA3) (appeal by objecting class members leads to rejection of settlement as unfair and inadequate), *cert. denied*, 516 U.S. 824 (1995).

Although respondents' argument is not entirely clear, it seems to be that the circuit conflict over objectors' right to appeal makes no practical difference because objectors always can intervene in the case and appeal on that basis. But respondents just ignore the myriad reasons – all set forth in the petition and summarized once again here – why that is not true:

- Class members do not have an automatic right to intervene. Intervention will be denied if they do not satisfy the requirements of Fed. R. Civ. P. 24(a) – in particular, the requirement that the class representatives are not adequately representing their interests.

- Intervention is costly and burdensome for the class member. The objector not only must file a complaint or answer in intervention, but also is then subject to all the ongoing requirements of a litigating party, including discovery.
- Requiring intervention is directly contrary to the point of class action litigation. On the view of the respondents and the Fourth Circuit, every class member who suspects that he *might* be disadvantaged by a settlement that *might* occur in the case must promptly intervene. By contrast, the goal of class action litigation – notably, a goal that the panel majority erroneously thought it was furthering – is to avoid having numerous class members in the case who can "usurp the role of the class representative" (Pet. App. A21).
- Requiring intervention undermines sound judicial administration. The District Courts will be burdened by requests to intervene. When they understandably deny those requests, the putative intervenor will immediately appeal as of right.

Respondents' specific reliance on the Seventh Circuit's appealability rule (BIO 15-16) is simply befuddling. As the petition explained (at 13) and respondents do not seem to contest, the rule in the Seventh Circuit is that a class action objector has an effectively *per se* right to intervene, even after the settlement is consummated, in order to preserve his right to appeal as a formal "party." *In re Synthroid Mktg. Litig.*, 264 F.3d at 715; *Crawford*, 201 F.3d at 880-81. In petitioner's view, that approach places a totally unnecessary burden on the district judge. But the relevant point here is that the Fourth Circuit *rejected* the Seventh Circuit's approach – it held that petitioner could not appeal notwithstanding that he had sought to intervene well before the district court approved the settlement. Of particular note, the Seventh Circuit adopted its incredibly permissive

approach to intervention precisely *because* objectors' right to appeal would otherwise be denied – *i.e.*, the Seventh Circuit's decisions flatly refute respondents' claim that this circuit conflict makes no difference. *Crawford*, 201 F.3d at 881 ("Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision.").

Finally, respondents at points attempt to cast aspersions on the manner in which petitioner litigated this case in the district court. The point of these asides is unclear – they do not suggest, and respondents do not contend, that this is an inappropriate vehicle to resolve the question presented. Moreover, respondents' claims are simply false. The class counsel consistently withheld information from petitioner. See, *e.g.*, C.A. App. 526 (Apr. 7, 1999 letter from petitioner to class counsel: "Dear Ms. Kraft: On at least four (4) separate occasions I have requested that you furnish the terms of the settlement of the action brought against the former Plan trustees, to no avail."), 528 (Apr. 7, 1999 letter from petitioner to class counsel: "You have also failed to furnish the terms of the settlement of the action brought against the former trustees and I request you end the secrecy that has been placed on all these matters and furnish the information requested."). Respondents' statement that they provided "periodic reports on the status of negotiations and the terms under discussion" (BIO 5) is just a euphemism for the fact that they said they were negotiating the abrogation of the COLA but, as the just-quoted letters explain, would not provide petitioner with the details. Petitioner also did not object "to any idea of settlement" (*id.*); there is no support for any such proposition in the cited pages of the appellate record (C.A. App. 525-35). His position was, and is, that ERISA prohibited abrogating the COLA for retirees, and that any settlement would accordingly have to treat the retirees

equitably.[2] And while it certainly is the case that petitioner did not formally move to intervene until the settlement was finalized and he received a copy, there is no reason in law or logic to hold that he had to act earlier in order to preserve his right to appeal the settlement. Not only would it have been impractical to object to the settlement earlier, it would have been *impossible*.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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November 21, 2001

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[2] Respondents' further suggestion that petitioner stands almost alone in objecting to the settlement (see BIO 6) is also false. Petitioner objected on his own behalf and also (as a representative of an association of retirees) on behalf of more than *half* of the retirees. See Pet. 4.

(12)

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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180 pp

TABLE OF CONTENTS

	Page
Docket Entries	1
First Amended Complaint for Declaratory and Injunctive Relief	24
Order Certifying Entry of Conditional Class Action and Directing Submission of Proposed Settlement and Notice to the Court	30
April 20, 1999 Letter from Arthur M. Wisehart to the Hon. J. Frederick Motz (with attachments)	34
May 12, 1999 Letter from Arthur M. Wisehart to the Hon. J. Frederick Motz	45
Plaintiffs' Motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine Whether The Proposed Settlement Should be Approved (with attachment)	47
Notice of Cross-Motion	56
Affidavit of Robert J. Devlin in Support of Cross-Motion (with attachment)	58
Order Certifying Entry of Conditional Class Action and Directing Submission of Proposed Settlement and Notice to the Court	72
Order Certifying Class and Setting Hearing on Proposed Settlement	76
Plaintiffs' Memorandum in Opposition to Robert Devlin's Motion to Intervene and Response to Cross-Motion	80
Affidavit of Brian A. Jones in Opposition to the Proposed Settlement	94
Objection of Charles O. Swasy	103
Notice of Objections to Proposed Settlement	104
October 7, 1999 Letter from James L. Bailey to Clerk of the U.S. District Court for the District of Maryland	117

TABLE OF CONTENTS—Continued

	Page
October 6, 1999 Letter from Desmond Frazer to Clerk of the U.S. District Court for the District of Maryland	119
October 4, 1999 Letter from Robert A. Parrish to Frank L. Monge, Clerk of the U.S. District Court for the District of Maryland	120
October 6, 1999 Letter from Cicero T. Lucas, Jr. to the Hon. J. Frederick Motz	122
October 4, 1999 Letter from Miriam E. Parrish to Frank L. Monge, Clerk of the U.S. District Court for the District of Maryland	123
September 30, 1999 Letter from James H. Groskopf to Clerk of the U.S. District Court for the District of Maryland	125
September 23, 1999 Letter from Andrew M. Hagan to the Hon. J. Frederick Motz	126
Declaration of Daniel C. Rudin	127
August 6, 1999 Memorandum for Counsel from the Hon. Paul W. Grimm to William Hanrahan	143
Declaration of Barbara Kraft	144
Transcript of Fairness Hearing Before the Hon. J. Frederick Motz, United States District Judge	151
Motion of Plaintiff Trustees for a Preliminary Injunction Pursuant to the All Writs Act	166
March 1, 2000 Order Granting Preliminary Injunction	170
March 15, 2000 Final Order	172
November 20, 2001 Memorandum re Issuance of Injunction Under All Writs Act	174
November 20, 2001 Order Granting Preliminary Injunction	177

U.S. DISTRICT COURT
DISTRICT OF MARYLAND
(BALTIMORE)

[Filed 10/14/97]

CIVIL DOCKET FOR CASE #: 97-CV-3464

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/14/97	1	COMPLAINT filed; FILING FEE $ 120.00, RECEIPT # B144578. (jb) [Entry date 10/17/97]
10/17/97	3	SUMMONS(ES) (20 days) issued for Robert J. Devlin, Thomas deBarr, Donald A. Bobo, R. I. Kilroy, F. T. Lynch, Frank Mazur. (jb)
10/28/97	4	RETURN OF SERVICE executed as to Robert J. Devlin 10/20/97 Answer due on 11/9/97 for Robert J. Devlin (jl)
10/29/97	5	Local Rule 103.3 Certification of Defendant Robert J. Devlin (jl)

DATE	NO.	PROCEEDINGS
11/12/97	6	STIPULATION AND ORDER "EXTENDING" time for Robert Devlin to move or answer, set Answer deadline to 12/12/97 for Robert J. Devlin (signed by Chf Judge J. F. Motz 11/12/97) (c/m 11/12/97-jan) (jan)
12/15/97	15	MOTION with memorandum in support by Robert J. Devlin to Dismiss, or in the Alternative, to Transfer Case; Affidavit and Exhibit A. (c/s) (Corrected Copy with the Addition of Kahn, Smith & Collins, P.A. Firm's Signature Block as Local Counsel-Received 12/17/97) (jan) [Edit date 12/18/97]
12/19/97	17	MOTION with memorandum in support by *R. A. Scardelletti, et al* to Consolidate Cases JFM-97-3464 and JFM-95-52 (jan)
12/29/97	18	MEMORANDUM by *R. A. Scardelletti, et al* in opposition to [15-1] motion to Dismiss, [15-2] motion to Transfer Case by Robert J. Devlin and Attachment. (c/s) (jan)
1/7/98	19	COMBINED MEMORANDUM IN RESPONSE by Thomas deBarr to [17-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52 by R. A. Scardelletti and [15-2] motion to Transfer Case by Robert J. Devlin. (c/s) (jan)
1/8/98	20	RESPONSE by R. I. Kilroy, Donald A. Bobo, F. T. Lynch, Frank Mazur in opposition to [17-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52 by R. A. Scardelletti. (c/s) (jan)

DATE	NO.	PROCEEDINGS
1/9/98	24	MEMORANDUM by Robert J. Devlin in opposition to [17-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52 by R. Scardelletti; Affidavit and Exhibit A. (c/s) (AFFIDAVIT & EXHIBIT FILED SEPARATELY) (jan)
1/9/98	25	MEMORANDUM by Robert J. Devlin in support of his [15-1] motion to Dismiss, [15-2] motion to Transfer Case. (c/s) (jan)
1/13/98	—	Scheduling conference held before Motz, Chf J. (jan) [Entry date 01/14/98]
1/30/98	27	SUPPLEMENTAL MEMORANDUM by R. A. Scardelletti, et al in opposition to [15-1] motion to Dismiss, [15-2] motion to Transfer Case by Robert J. Devlin. (c/s) (jan)
3/16/98	32	MOTION with memorandum in support by *R. A. Scardelletti, et al* for Class Certification; Declaration and Exhibits A-B. (c/s) (jan) [Entry date 03/17/98]
3/26/98	33	ORDER granting [30-1] motion for Enlargement of Time in which to File Plaintiffs' Motion for Class Certification and Defendant Devlin's Opposition thereto, the briefing scheduling for the class certification motion set forth in the Court's 1/13/98 Order is therefore Modified. (signed by Chf Judge J. F. Motz 3/26/98) (c/m 3/26/98-jan) (jan)

DATE	NO.	PROCEEDINGS
4/1/98	34	REPLY MEMORANDUM by Robert J. Devlin to [27-1] opposition memorandumby R. A. Scardelletti; Reply Affidavit and Exhibits A-D. (c/s) (jan) [Entry date 04/02/98]
4/17/98	35	MOTION by Thomas deBarr to Extend Time to File a Response to Plaintiffs' Motion for Class Certification. (c/s) (jan)
4/17/98	36	MEMORANDUM by Robert J. Devlin in opposition to [32-1] motion for Class Certification by R. A. Scardelletti; Attachment and Affidavit. (c/s) (jan)
4/21/98	38	RESPONSE by Thomas deBarr to [32-1] motion for Class Certification by R. A. Scardelletti; Exhibits 1-2 and Declarations. (c/s) (jan)
5/1/98	39	REPLY by R. A. Scardelletti, Frank Ferlin Jr., Joel Parker, Don Bujold to defendant DeBarr's response to their [32-1] motion for Class Certification and Attachment (c/s) (jl)
5/1/98	40	REPLY by Robert J. Devlin in opposition to [32-1] motion for Class Certification by R. A. Scardelletti; Affidavit and Exhibit A (c/s) (jl)
5/4/98	41	MOTION by Robert J. Devlin to Substitute Attorney (jan) [Entry date 05/07/98]
5/4/98	41	ORDER granting [41-1] motion of Robert Devlin to Substitute Attorney terminated attorney Christyne L. Neff for Robert J. Devlin Added Travis M. Mastroddi (signed by Chf Judge J. F. Motz 5/4/98) (c/m 5/7/98-jan) (c/m) (jan) [Entry date 05/07/98]

DATE	NO.	PROCEEDINGS
6/5/98	—	Motion hearing held before (Motz, CJ) re: [15-1] motion to Dismiss by Robert J. Devlin, [32-1] motion for Class Certification by R. A. Scardelletti (REPORTER: Barbara Shaulis) (Written decision to be submitted by the Court) (bea) [Entry date 06/08/98]
6/5/98	—	ORAL MOTION in open court by Robert J. Devlin to amend complaint to name a new representative defendant in place of ROBERT J. DEVLIN—"GRANTED"—for reasons stated in open court. (Written order to be submitted by the Court) (bea) [Entry date 06/08/98]
6/5/98	42	ORDER granting [0-0] Oral motion to amend complaint. (signed by Chf Judge J. F. Motz 6/5/98) (c/m 6/5/98-gs)(jan) [Entry date 06/08/98]
6/5/98	43	ORDER denying [15-1] motion of Robert J. Devlin to Dismiss, and denying [15-2] motion to Transfer Case. (signed by Chf Judge J. F. Motz 6/5/98) (c/m 6/5/98-gs) (jan) [Entry date 06/08/98]
7/15/98	44	AMENDED COMPLAINT by R. A. Scardelletti, Frank Ferlin Jr., Joel Parker, Don Bujold , (Answer due 7/25/98 for Frank Mazur, for F. T. Lynch, for R. I. Kilroy, for Donald A. Bobo, for George Thomas Debarr) amending [1-1] complaint against Anthony Santoro Sr. (c/s) (jan) [Entry date 07/16/98]

DATE	NO.	PROCEEDINGS
7/15/98	—	Scheduling conference held before Motz, Chf J. (jan) [Entry date 07/16/98]
8/13/98	53	ANSWER by Donald A. Bobo, R. I. Kilroy, F. T. Lynch, Frank Mazur to First Amended Complaint. (c/s) (jan)
8/14/98	54	MOTION with memorandum in support by *R. A. Scardelletti, et al* to Consolidate Cases JFM-97-3464 and JFM-95-52. (c/s) (jan) [Edit date 08/14/98]
8/14/98	55	MOTION with memorandum in support by *R. A. Scardelletti, et al* For Class Certification; Declaration and Exhibits A-B. (c/s) (jan)
8/25/98	56	ORDER granting [56-1] motion of Anthony Santoro to Extend Time to respond to Plaintiff's request for consolidation and for submitting the joint request for early settlement to 10/2/98 (signed by Chf Judge J. F. Motz 8/25/98) (c/m 8/26/98-jan) (jan) [Entry date 08/26/98]
9/14/98	57	ANSWER by Anthony Santoro Sr. to amended complaint. (c/s) (jan) [Entry date 09/15/98]
9/14/98	57	COUNTERCLAIM by Anthony Santoro Sr. against R. A. Scardelletti, Frank Ferlin Jr., Joel Parker, Don Bujold. (c/s) (jan) [Entry date 09/15/98]
9/21/98	58	AMENDED ANSWER to Complaint by Anthony Santoro Sr.: amends [57-1] complaint answer by Anthony Santoro Sr.. (c/s) (jan)

DATE	NO.	PROCEEDINGS
9/24/98	59	RESPONSE by George Thomas Debarr to [55-1] motion For Class Certification by R. A. Scardelletti and Attachments. (c/s) (jan)
10/20/98	65	RESPONSE by Anthony Santoro Sr. to [54-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52 by R. A. Scardelletti. (c/s) (jan) [Entry date 10/28/98]
10/20/98	66	RESPONSE by Anthony Santoro Sr. to [55-1] motion For Class Certification by R. A. Scardelletti. (c/s) (jan) [Entry date 10/28/98]
10/23/98	67	REPLY by R. A. Scardelletti, Frank Ferlin Jr., Joel Parker, Don Bujold to response of Defendants to their [55-1] motion For Class Certificatio and to their [54-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52. (c/s) (dl)
10/30/98	—	Motion hearing held before C. J. Motz re: [55-1] motion For Class Certification by R. A. Scardelletti, [54-1] motion to Consolidate Cases JFM-97-3464 and JFM-95-52 by R. A. Scardelletti; argued and held sub curia (ER: Lauman). (ml)
12/31/98	68	MOTION with memorandum in support by *R. A. Scardelletti, et al* for Dismissal of Donald A. Bobo, R.I. Kilroy, F.T. Lynch and Frank Mazur. (c/s) (jan)
1/5/99	69	ORDER granting [68-1] motion of Plaintiff for Dismissal with Prejudice of Donald A. Bobo, R.I. Kilroy, F.T. Lynch and Frank Mazur. (signed by Chf Judge J. F. Motz 1/5/99) (c/m 1/5/99) (jan)

DATE	NO.	PROCEEDINGS
1/20/99	113	TRANSCRIPT filed [104-1] appeal by Robert J. Devlin for dates of October 30, 1999 (Filed separately) (ac) [Entry date 01/21/00]
2/9/99	70	ORDER CERTIFYING ENTRY OF CONDITIONAL CLASS ACTION AND DIRECTING SUBMISSION OF PROPOSED SETTLEMENT AND NOTICE TO THE COURT. (signed by Chf Judge J. F. Motz 2/9/99) (c/m 2/9/99) (jan)
4/7/99	71	ORDER REFERRING CASE to Magistrate Judge Paul W. Grimm for Settlement or other ADR Conference. (signed by Chf Judge J. F. Motz 3/30/99) (c/m 4/7/99-hsg) (jan)
4/23/99	72	BRIEF by Robert J. Devlin RE: Relationship between this litigation and the claims of Mr. Devlin previously asserted in the USDC for the Southern District of New York, and exhibits A-K. (c/s) (FILED SEPARATELY) (dl) [Entry date 04/26/99]
8/27/99	74	MOTION with memorandum in support by *R. A. Scardelletti, et al* to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved and Exhibits. (c/s) (jan) [Entry date 08/30/99] [Edit date 09/14/99]

DATE	NO.	PROCEEDINGS
9/10/99	75	CROSS MOTION with memorandum in support by Robert J. Devlin to Dismiss, Deny or Strike [74-1] motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved by R. A. Scardelletti, and to Intervene and Exhibits A-P. (c/s) (MEMORANDUM AND EXHIBITS FILED SEPARATELY) (jan) [Entry date 09/14/99] [Edit date 09/14/99]
9/14/99	76	ORDER GRANTING [74-1] motion of Plaintiff to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved as therein set forth. (signed by Chf Judge J. F. Motz 9/14/99) (c/m 9/15/99-jan) (jan) [Entry date 09/15/99]
9/24/99	77	MEMORANDUM by *R. A. Scardelletti, et al* in opposition to [75-1] motion to Dismiss, Deny or Strike [74-1] motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved by R. A. Scardelletti by Robert J. Devlin, [75-2] motion to Intervene by Robert J. Devlin. (c/s) (jan)

DATE	NO.	PROCEEDINGS
9/24/99	77	RESPONSE by *R. A. Scardelletti, et al* to [75-2] motion to Intervene by Robert J. Devlin, [75-1] motion to Dismiss, Deny or Strike [74-1] motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved by R. A. Scardelletti by Robert J. Devlin. (c/s) (jan)
10/1/99	78	CORRESPONDENCE by Don Bujold RE: Declaration of Megan Madia and exhibits 1 and 2. (c/s) (sf)
10/1/99	79	RESPONSE by A. Meaders in opposition to Settlement of Class Action and Settlement Hearing (c/s) (ms) [Entry date 10/04/99]
10/4/99	80	REPLY MEMORANDUM by *Robert J. Devlin, et al* in support of their [75-1] motion to Dismiss, Deny or Strike [74-1] motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine whether the Proposed Settlement should be Approved by R. A. Scardelletti [75-2] motion to Intervene; Exhibits and Reply Affidavit. (c/s) (cag)
10/4/99	81	CORRESPONDENCE by James H. Groskopf RE: Objection to the Settlement proposed in this case. (c/s) (jan) [Entry date 10/05/99]

DATE	NO.	PROCEEDINGS
10/4/99	82	CORRESPONDENCE by Thomas C. Robinson RE: Objection to the Settlement and Attachments. (c/s) (jan) [Entry date 10/05/99]
10/5/99	83	CORRESPONDENCE by Doyle W. Beat RE: Objection to Class Action Litigation. (c/s) (jan)
10/7/99	84	CORRESPONDENCE by Miriam E. Parrish RE: Objection to Proposed Settlement. (c/s) (jan)
10/7/99	85	CORRESPONDENCE by Robert A. Parrish RE: Objection to Proposed Settlement. (c/s) (jan)
10/12/99	86	CORRESPONDENCE by Desmond Fraser RE: Objection to Proposed Settlement. (c/s) (jan)
10/12/99	87	CORRESPONDENCE by James L. Bailey RE: Objection to Proposed Settlement. (c/s) (jan)
10/13/99	88	CORRESPONDENCE by Dorothy Deerwester RE: Objection to Proposed Settlement. (c/s) (jan)
10/13/99	89	CORRESPONDENCE by Thomas J. Hewson RE: Objection to Proposed Settlement. (c/s) (jan)
10/14/99	90	CORRESPONDENCE by Clay B. Wolfe RE: Objection to Proposed Settlement and Exhibits. (c/s) (jan) [Entry date 10/15/99]
10/18/99	91	MOTION by the Retiree Subclass to Quash Subpoenas and Notices of Deposition of Barbara Kraft and Claude Poulin. (jan)

DATE	NO.	PROCEEDINGS
10/18/99	92	ORDER GRANTING [91-1] motion of the Retiree Sublcass and its Counsel to Quash Subpoenas and Notices of Deposition of Barbara Kraft and Claude Poulin. (signed by Chf Judge J. F. Motz 10/15/99) (c/m 10/18/99) (jan)
10/18/99	93	CORRESPONDENCE by Kenneth B. Lane RE: Objection to Proposed Settlement. (c/s) (jan)
10/18/99	94	AFFIDAVIT by Brian A. Jones Re: Opposition to the Proposed Settlement and Exhibits A-F. (c/s) (jan) [Entry date 10/19/99]
10/18/99	95	NOTICE of by Robert J. Devlin of Objections to Proposed Settlement and Exhibits A-S. (c/s) (jan) [Entry date 10/19/99]
10/20/99	96	CORRESPONDENCE by Charles O. Swasy RE: Objection to Proposed Settlement. (c/s) (jan)
10/27/99	97	MOTION with memorandum in support by *R. A. Scardelletti, et al* in Limine to Strike Portions of the Affidavit of Brian A. Jones in Opposition to the Proposed Settlement. (c/s) (jan)
10/27/99	—	Settlement conference held before Grimm, USMJ. (jan) [Entry date 11/03/99]
10/27/99	—	CASE NO LONGER REFERRED TO Magistrate Judge Paul W. Grimm. (jan) [Entry date 11/03/99]
11/4/99	98	PLAINTIFF'S PRE-HEARING MEMORANDUM in support of Settlement; Exhibits 1-7, and Declarations with Exhibits.

DATE	NO.	PROCEEDINGS
		(c/s) (EXHIBITS & DECLARATIONS FILED SEPARATELY) (Original Declaration of Mary Sue Dickinson and Exhibits—Received 11/5/99) (jan) [Edit date 11/05/99]
11/9/99	99	THE DEFENDANT ACTIVE SUBCLASS' PRE-HEARING MEMORANDUM in Support of Class Action Settlement; Declaration and Exhibits A-C. (c/s) (jan)
11/10/99	100	MEMORANDUM by Robert J. Devlin in opposition to [97-1] motion in Limine to Strike Portions of the Affidavit of Brian A. Jones in Opposition to the Proposed Settlement by R. A. Scardelletti; Exhibit A, and Affidavit with Exhibits A-D. (c/s) (jan)
11/10/99	101	PRE-HEARING MEMORANDUM by Anthony Santoro Sr., The Retiree Subclass in support of the proposed Settlement and Exhibit A. (c/s) (jan)
11/12/99	102	MOTION with memorandum in support by Robert J. Devlin for Preliminary Injunction, in Limine by striking the Declarations and accompanying Memoranda, and disqualify Kenneth M. Johnson and Barbara Kraft as counsel and exhibits A and B and 1, Affidavit of Robert J. Devlin, and exhibits 1-4, and deposition of Claude Poulin. (c/s) (file separately) (sf)
11/12/99	103	CORRECTED DECLARATION OF DANAIEL C. RUDIN and Exhibits 1-2. (c/s) (EXHIBIT 1—SEALED) (jan) [Entry date 11/15/99]

DATE	NO.	PROCEEDINGS
11/12/99	—	Motion hearing re: Fairness Hearing. The Court agreed that the settlement was adequate. (Court Reporter: Lisa Bankins) (kam) [Entry date 12/07/99]
12/1/99	104	NOTICE OF APPEAL and attachment Exhibit A, by Robert J. Devlin . Fee Status: (Filing fee paid)(c/s) (ac) [Entry date 12/08/99]
12/6/99	105	Transcript of proceedings held before the Court on November 12, 1999 (FILED SEPARATELY) (ac) [Entry date 12/08/99]
12/8/99	—	Notice of appeal and certified copy of docket to USCA: [104-1] appeal by Robert J. Devlin (Appeal forms mailed to counsel) (ac)
12/9/99	106	ORDER "RETAINING" record for the use in ongoing litigation, pursuant to Rule 11(e) FRAP, with exceptions as therein set forth. (signed by Chf Judge J. F. Motz) (c/m 12/9/99 akc) (ac)
12/16/99	107	DESIGNATION by Don Bujold, Joel Parker, Frank Ferlin Jr., R. A. Scardelletti of record on appeal and attachments. (attachments filed separately) (ac)
12/16/99	108	AMENDED ORDER "RETAINING" record for the use in ongoing litigation, pursuant to Rule 11(e) FRAP, with exceptions as therein set forth. (signed by Chf Judge J. F. Motz) (c/m 12/16/99 akc) (ac)
12/17/99	—	USCA Case Number Re: [104-1] appeal by Robert J. Devlin USCA NUMBER: 99-2619 (Case Mgr. B. Rowe) (ac)

DATE	NO.	PROCEEDINGS
12/17/99	—	USCA Case Number Re: [104-1] appeal by Robert J. Devlin USCA NUMBER: 99-2619 (Case Mgr. B.Rowe) (ac)
12/28/99	—	USCA Case Number Re: [104-1] appeal by Robert J. Devlin USCA NUMBER: 99-2619 (Case Mgr. B. Rowe) (ac)
12/30/99	109	DESIGNATION by Robert J. Devlin and the Retired Employees Protective Association of record on appeal, Exhibits A thru D and attachments. (Attachments filed separately) (ac)
1/3/00	110	ADDITIONAL DESIGNATION by Robert J. Devlin of record on appeal and attachments. (attachments filed separately) (ac)
1/3/00	111	DESIGNATION of defendant Retiree Subclass of record on appeal (ac) [Entry date 01/14/00]
1/7/00	112	Correspondence Re: corrections to DESIGNATION by Robert J. Devlin of record on appeal (ac) [Entry date 01/14/00]
1/20/00	113	TRANSCRIPT filed [104-1] appeal by Robert J. Devlin for dates of October 30, 1999 (Filed separately) (ac) [Entry date 01/24/00]
1/31/00	114	MOTION with memorandum in support by *R. A. Scardelletti, et al* for Preliminary Injunction Pursuant to the All Writs Act and Exhibits A-H. (c/s)_ (jan)
2/4/00	115	PLAINTIFFS' SUPPLEMENTAL MEMORANDUM Concerning the Objection of Clay B. Wolfe and Attachment. (c/s) (jan)

DATE	NO.	PROCEEDINGS
2/4/00	116	MOTION by *R. A. Scardelletti, et al* for Entry of an Order Clarifying the Court's Rulings on Various Non-Party Motions. (c/s) (jan)
2/10/00	117	RESPONSE OF THE RETIREE SUB-CLASS REPRESENTATIVE to [115-1] support memorandum; [116-1] motion for Entry of an Order Clarifying the Court's Rulings on Various Non-Party Motions by R. A. Scardelletti. (c/s) (jan)
2/14/00	118	RESPONSE by Clay B. Wolfe to [115-1] memorandum by R. A. Scardelletti to Objection of Clay B. Wolfe. (c/s) (CORRECTED COPY—Received 2/11/00) (das) [Edit date 02/22/00]
2/14/00	119	MEMORANDUM by Robert J. Devlin and the Retired Employees Protective Association (REPA) in opposition to [114-1] motion for Preliminary Injunction Pursuant to the All Writs Act by R. A. Scardelletti, and Exhibits A-N. (c/s) (EXHIBITS FILED SEPARATELY) (das)
2/15/00	120	RESPONSE by George Thomas Debarr to [114-1] motion for Preliminary Injunction Pursuant to the All Writs Act by R. A. Scardelletti. (c/s) (jan)
2/16/00	121	MEMORANDUM IN RESPONSE by R. A. Scardelletti, Frank Ferlin Jr. to Retiree Subclass Representative's Objection to Settlement (c/s) (cag)

DATE	NO.	PROCEEDINGS
2/18/00	122	MOTION by Robert J. Devlin to supplement the record on appeal (ac) [Entry date 02/22/00] [Edit date 02/22/00]
2/18/00	123	ORDER granting [124-1] motion to supplement the record on appeal and doarecting Mr.Wisehart provide copies of those letters to the Clerk (signed by Chf Judge J. F. Motz) (c/m by chambers 2/18/00) (ac) [Entry date 02/22/00] [Edit date 02/22/00]
2/22/00	124	RESPONSE by George Thomas Debarr to Plaintiff Trustees' [115] Supplemental Memorandum Concerning the Objection of Clay B. Wolfe and Exhibit. (c/s) (jan) [Edit date 02/22/00]
2/22/00	125	MEMORANDUM by Robert J. Devlin in opposition to [116-1] motion for Entry of an Order Clarifying the Court's Rulings by R. A. Scardelletti; Affidavit and Exhibits A-E. (c/s) (AFFIDAVIT & EXHIBITS FILED SEPARATELY) (jan) [Edit date 02/22/00]
2/23/00	126	REPLY MEMORANDUM by *R. A. Scardelletti, et al* in support of their [114-1] motion for Preliminary Injunction Pursuant to the All Writs Act. (c/s) (jan)
3/9/00	127	REPLY of Retiree Subclass Representative to Plaintiffs' Memorandum in Response to Retiree Class Representative's Objection to Settlement. (c/s) (jan)
3/10/00	—	Motion hearing held before (Motz, CJ)—ARGUED—Oral opinion rendered by the

DATE	NO.	PROCEEDINGS
		Court enjoining Devlin in suit pending in the Southern District of New York (Court Reporter: M.ZAJAC) (ba) [Entry date 03/13/00]
3/15/00	128	ORDER DENYING Cross-Motion of Robert J. Devlin, filed on 9/10/99 to intervene as a party to this action; DENYING AS MOOT the Motions for other relief contained in the cross-motion; and DENYING AS MOOT the Motions for a Preliminary Injunction for other relief filed by Robert J. Devlin on 11/12/99. (signed by Chf Judge J. F. Motz 3/15/00) (c/i 3/15/00) (jan)
3/15/00	129	ORDER GRANTING [114-1] motion of Plaintiff Trustees for Preliminary Injunction Pursuant to the All Writs Act as therein set forth. (signed by Chf Judge J. F. Motz 3/15/00) (c/i 3/15/00) (jan)
3/15/00	130	FINAL ORDER DIRECTING the Settlement Agreement is approved as therein set forth; and DISMISSING this action with prejudice. (signed by Chf Judge J. F. Motz 3/15/00) (c/i 3/15/00) (MICROFILMED 3/15/00) (jan) [Edit date 03/15/00]
3/15/00	—	Case closed (jan)
3/15/00	131	Transcript of proceedings held before the Court on March 10, 2000 (FILED SEPARATELY) (jan) [Entry date 03/16/00]
3/22/00	132	MOTION with memorandum in support by Robert J. Devlin for a Stay Pending Appeal; Affidavit and Exhibits A-F. (c/s) (EXHIBITS FILED SEPARATELY) (jan)

DATE	NO.	PROCEEDINGS
3/30/00	133	MOTION by *R. A. Scardelletti, et al* for an Order to Show Cause and Exhibits A-F. (c/s) (jan)
4/3/00	134	NOTICE OF APPEAL by Robert J. Devlin and the Retired Employees Protective Association ("REPA") and Exhibits A thru D) Fee Status: (Filing fee paid)(c/s) (ac) [Entry date 04/04/00]
4/4/00	—	Notice of appeal and certified copy of docket to USCA: [134-1] appeal by Robert J. Devlin (Appeal forms mailed to counsel) (ac)
4/4/00	135	MEMORANDUM by Robert J. Devlin in opposition to [133-1] motion for an Order to Show Cause by R. A. Scardelletti; Affidavit and Exhibits A-C. (c/s) (AFFIDAVIT AND EXHIBITS FILED SEPARATELY) (jan)
4/6/00	136	RESPONSE by *R. A. Scardelletti, et al* in opposition to [132-1] motion for a Stay Pending Appeal by Robert J. Devlin. (c/s) (jan)
4/13/00	137	ORDER (copy) (U.S. COURT OF APPEALS, FOR THE FOURTH CIRCUIT) "CONSOLIDATING" cases 99-2619 and 00-1311 for purposes of briefing and oral argument. (ac)
4/13/00	—	USCA Case Number Re: [134-1] appeal by Robert J. Devlin USCA NUMBER: 00-1411 (Case Mgr. B.Rowe) (ac)

DATE	NO.	PROCEEDINGS
4/17/00	138	SUPPLEMENTAL MEMORANDUM by *R. A. Scardelletti, Frank Ferlin Jr., et al* in support of their [133-1] motion for an Order to Show Cause (c/s) (cag)
4/17/00	139	REPLY MEMORANDUM by Robert J. Devlin and REPA in support of their [132-1] motion for a Stay Pending Appeal and Exhibits. (c/s) (cag) [Entry date 04/18/00]
4/25/00	140	TRANSCRIPT filed [134-1] appeal by Robert J. Devlin for dates of April 20, 2000 (Filed separately) (ac)
4/26/00	141	NOTICE OF APPEAL by Robert J. Devlin and the Retired Employees Protective Association ("REPA") and Exhibit A. Fee Status: (Filing fee paid) (c/s) (ac) [Entry date 04/27/00] [Edit date 04/27/00]
4/27/00	—	Notice of appeal and certified copy of docket to USCA: [141-1] appeal by Robert J. Devlin (Appeal forms mailed to counsel) (ac)
5/4/00	—	USCA Case Number Re: [141-1] appeal by Robert J. Devlin USCA NUMBER: 00-1525 (Case Mgr. B. Rowe) (ac)
8/22/01	142	JUDGMENT OF USCA (certified copy) affirming in part, reversing in part the judgment of the District Court, and remanding case for further proceedings, copy of opinion attached herto. Re: [141-1] appeal by Robert J. Devlin, [134-1] appeal by Robert J. Devlin (c/s) (ko)

DATE	NO.	PROCEEDINGS
8/23/01	143	ORDER of the USCA denying cross-bills of costs. (c/s) (ko)
8/28/01	—	Case reopened (jan)
9/17/01	144	LETTER/MOTION by *Don Bujold, et al* for Leave to File Memorandum in Support of Injunction Pursuant to The All Writs Act and Proposed Memorandum. (c/s) (jan)
9/25/01	145	AFFIDAVIT by Robert J. Devlin Re: Response to the Letter of the Court Dated 8/27/01 and Exhibits A-E. (c/s) (FILED SEPARATELY) (jan)
9/26/01	146	SEALED AFFIDAVIT by Arthur M. Wisehart (c/s) (cag)
10/10/01	147	REPLY MEMORANDUM of Plaintiff Trustts in support of Injunction Pursuant to the All Writs Act. (c/s) (jan)
10/10/01	148	MOTION by Robert J. Devlin to Seal Affidavit of Arthur M. Wisehart. (c/s) (jan) [Entry date 10/11/01]
11/20/01	149	MEMORANDUM (signed by Judge J. F. Motz 11/20/01) (c/i 11/20/01) (jl)
11/20/01	150	ORDER granting [114-1] motion of plaintiff for Preliminary Injunction Pursuant to the All Writs Act (signed by Judge J. F. Motz 11/20/01) (c/i 11/20/01) (jl)
12/17/01	151	ORDER of the US Supreme Court GRANTING a writ of certiorari (c/s) (ko)
12/20/01	152	Interlocutory NOTICE OF APPEAL by Robert J. Devlin, Thomas J. Hewson . with Exhibits A & B. Fee Status: (Filing Fee Paid) (c/s) (ko) [Entry date 12/21/01]

DATE	NO.	PROCEEDINGS
12/21/01	—	Notice of appeal and certified copy of docket to USCA: [152-1] appeal by Thomas J. Hewson, Robert J. Devlin (c/m) (ko)
1/2/02	—	Case closed (jan) [Entry date 01/14/02]
1/8/02	153	DESIGNATION of record on appeal filed by *Robert J. Devlin et al.* (FILED SEPARATELY) (ko) [Edit date 01/08/02]
1/14/02	—	USCA Case Number Re: [152-1] appeal by Thomas J. Hewson, Robert J. Devlin USCA NUMBER: 02-1013 (Case Manager: Deborah Daniel) (ko)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI,
FRANK FERLIN, JR.,
JOEL PARKER,
3 Research Place
Rockville, Maryland 20850
Montgomery County

and

DON BUJOLD
285 D St. Laurent Boulevard
Ottawa, Ontario, Canada K1G 4Z7
As trustees of the Transportation Communications
International Union Staff Retirement Plan
Plaintiffs,

v.

ANTHONY SANTORO, SR.,
8028 High Point Road
Baltimore, MD 21234
Baltimore County

GEORGE THOMAS DEBARR
2400 Elsworth Way #1C
Frederick, MD 21702
Frederick County
Individually and as representatives of a class of
all persons similarly situated,

and

DONALD A. BOBO,
7517 Coddle Harbor Lane
Potomac, Maryland 20854
Montgomery County

R. I. KILROY,
3134 Evergreen Way
Ellicott City, MD 21042
Baltimore County

F.T. LYNCH,
9208 Oaklyn Terrace
Potomac, Maryland 20854
Montgomery County

FRANK MAZUR
229 South Kenogami Avenue
Thunder bay, Ontario, Canada
PB7 4S2

Defendants.

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action is brought on behalf of the Transportation Communications International Union Staff Retirement Plan (the "Plan") pursuant to sections 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3), and 28 U.S.C. §§ 2201 and 2202, to obtain appropriate equitable and declaratory relief to adjudicate the rights of the participants in the Plan and their beneficiaries to receive benefits under certain amendments made to the Plan.

* * *

Class Action Allegations

12. Plaintiffs bring to this action against defendants Santoro and DeBarr individually and as representatives of a class including all participants of the Plan who first earned Credited Service under the Plan before May 15, 1993 (the "Class") and their beneficiaries.

13. The members of the Class are so numerous that joinder of all class members is impracticable. The Class exceeds 700 members, including approximately 402 retired participants, 123 terminated vested participants, 206 active participants, and their beneficiaries.

14. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether an amendment to the Plan adopted on October 13, 1990, and effective on January 1, 1991 (the "COLA amendment"), providing for an automatic cost of living adjustment ("COLA") to a Plan participant's retirement benefit on every third anniversary of his retirement date, should be declared null and void as of the date of its adoption, on account of its having been adopted as the result of a breach of fiduciary duty committed by defendants Bobo, Kilroy, Lynch, and Mazur; and,

(b) whether an October 6, 1997 amendment to the Plan, which eliminated the increases in monthly benefit amounts put into place under the COLA amendment and eliminated all future COLA increases for all participants who separated from service prior to January 1, 1991, is a lawful amendment.

15. The Class is composed of all participants in the Plan who first earned Credited Service, as that term has been

defined in the Plan from time to time, prior to May 15, 1993, and their beneficiaries, as that term is defined in ERISA section 3(8), 29 U.S.C. § 1002(8).

16. The Class is composed of two Subclasses.

(a) The first Subclass consists of members of the Class who retired or separated from service with TCU before November 1, 1995 and their beneficiaries (the "Retiree Subclass"). The Retiree Subclass contains approximately 402 retired participants and 72 terminated vested participants.

(b) The second Subclass consists of members of the Class who earned any Credited Service under the Plan on or after November 1, 1995, and their beneficiaries (the "Active Sublcass"). The Active Subclass contains approximately 245 participants.

17. Defendant Santoro is a member of the Class and of the Retiree Subclass, and his claims and defenses are typical of the claims and defenses of the Retiree Subclass. Plaintiffs allege, on information and belief, that Santoro is familiar with the issues raised by the instant complaint, and will vigorously represent the interests of the Retiree Subclass.

18. Defendant DeBarr is a member of the Class and of the Active Subclass, and his claims and defenses are typical of the claims and defenses of the Active Subclass. Defendant DeBarr is the Executive Director/Operations of TCU. As an active employee, he is aware of the pending litigation styled *Scardelletti v. Bobo*, Civil Action No. 95-52 JFM (the "*Bobo* litigation") and familiar with the issues presented therein. Plaintiffs allege, on information and belief, that DeBarr will vigorously represent the interest of the Active Subclass.

19. Certification of the Class and the Subclasses is appropriate under Fed. R. Civ. P. 23(b)(1) because the prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or

varying adjudications of the Plan's obligations with regard to the COLA amendment and the October 6, 1997 amendment. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(2), because the Plan amendments at issue act on grounds generally applicable to the Class and the Subclasses, making declaratory and injunctive relief appropriate on a class-wide basis.

* * *

Claim

(Declaratory Judgment and Injunctive Relief)

36. Plaintiffs hereby incorporate by reference paragraphs 1 through 35 as if set forth in full herein.

37. As a direct consequence of the fiduciary breaches committed by defendants Bobo, Kilroy, Lynch, and Mazur, the Plan has been damaged, and will be damaged in the future, by the payment of benefits provided under the COLA amendment. Plaintiffs are therefore entitled under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to final declaratory and injunctive relief declaring the COLA amendment void from its inception, and of no force and effect, as to all members of the Class, and as to defendants Bobo, Kilroy, Lynch, and Mazur.

38. In the alternative, with respect to members of the Retiree Subclass, the benefits provided by the COLA amendment are not "accrued benefits" or a "retirement-type subsidy" within the meaning of ERISA section 204(g), and may be lawfully eliminated by an amendment to the Plan. Plaintiffs are entitled to final declaratory and injunctive relief declaring that the October 6, 1997 amendment is a valid and enforceable amendment eliminating benefits provided by the COLA amendment for the members of the Retiree Subclass.

39. In the alternative, with respect to members of the Active Subclass, the COLA benefits are not subject to

reduction by a Plan amendment on account of being "accrued benefits" within the meaning of ERISA section 204(g). However, because the COLA amendment was adopted as the direct result of a fiduciary breach causing damages to the Plan by the payment of benefits provided under the COLA amendment, Plaintiffs are entitled under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to final declaratory and injunctive relief declaring the COLA amendment void from its inception, and of no force and effect, as to all members of the Active Subclass, and as to defendants Bobo, Kilroy, Lynch, and Mazur.

Relief

WHEREFORE, Plaintiffs pray that the court enter an order:

1. Declaring the COLA amendment null and void as of the date of its adoption and eliminating any obligations thereunder as to all members of the Class and defendants Bobo, Kilroy, Lynch, and Mazur;

2. In the alternative, (a) declaring that the October 6, 1997 amendment is a valid and enforceable Plan amendment and that under the terms of that amendment, the Plan has no obligation, on and after November 1, 1997, to provide COLA benefits to members of the Retiree Subclass; and, (b) declaring the COLA amendment null and void as of the date of its adoption and eliminating any obligations thereunder to members of the Active Subclass and defendants Bobo, Kilroy, Lynch, and Mazur.

3. Ordering such further relief as the court deems appropriate.

Dated: July 14, 1998

/s/ William F. Hanrahan
WILLIAM F. HANRAHAN
(Federal Bar No. 012248)
LONIE A. HASSEL
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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

C.A. No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

ORDER CERTIFYING ENTRY OF CONDITIONAL CLASS ACTION AND DIRECTING SUBMISSION OF PROPOSED SETTLEMENT AND NOTICE TO THE COURT

Upon consideration of plaintiffs' motion for class certification and the responses thereto of the putative class representatives George Thomas DeBarr and Anthony Santoro, Sr., and in accordance with the Opinion granting said motion filed concurrently herewith, it is, subject to alteration or amendment under Fed. R. Civ. P. 23(c) conditionally ORDERED:

1. *Class Certification.* This action, titled *R.A. Scardelletti, et al. v. Anthony Santoro, Sr., et al.*, shall be maintained as a class action. This conditional certification is granted for purposes of the parties' attempts to arrive at a settlement which could subsequently be certified and noticed as a settlement class action. For purposes of this conditional certification, the action shall be maintained on behalf of the following class of defendants:

> All active, terminated vested and retired participants and their beneficiaries in the Transportation Communications International Union Staff Retirement Plan.

> This class shall be further divided into subclasses denominated Subclass 1 and Subclass 2.

Subclass 1 shall consist of two parts, as follows:

> Subclass 1-A will consist of all class members who retired on or after January 1, 1991 and will suffer a loss in their benefits in the event this Court grants the equitable relief sought in the complaint.
>
> Subclass 1-B will consist of all class members who retired prior to January 1, 1991 (and their beneficiaries) whose retirement benefits were reduced as a result of the October 1997 plan amendment eliminating the automatic COLA adjustment to their benefits.

Subclass 2 shall consist of all class members who, based on certain assumptions regarding future compensation and years of service as well as the March, 1998 resolution of the Executive Council of the Transportation Communications International Union, would likely benefit in the event this Court grants the equitable relief sought in the complaint.

The following persons shall be excluded from the class: R. A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Mitchell M. Kraus, Donald A. Bobo, R. I. Kilroy, F. T. Lynch and Frank Mazur.

The Court and the parties agree that the passage of time and unanticipated events may affect the determination of whether particular class members are in Subclass 1 or Subclass 2 at any given point in time. The Court and the parties agree that any settlement reached in this action may require a modification of the definition of the two subclasses for purposes of notice and final certification. The Court and the parties also agree that, should the parties not succeed in reaching a settlement, or should the Court determine not to approve a proposed settlement, the definitions of the class and the two subclasses may be revised.

2. *Class Representative: Class Counsel.* Subject to further order of the Court, Anthony Santoro, Sr. is designated class representative of Subclass 1. George Thomas DeBarr is designated class representative of Subclass 2. Barbara Kraft is designated counsel for Subclass 1. Kenneth M. Johnson is designated as counsel for Subclass 2.

3 *Submission of proposed settlement and notice to the Court.* By March 26, 1999, counsel and the class representatives shall submit to the Court their proposed settlement of this case and a proposed *Notice of Pendency of Class Action and Hearing on Proposed Settlement* in a form to be agreed upon by the parties. The Court will thereafter determine whether the proposed settlement appears to be within the range of reasonableness and whether it should be submitted to class members for their approval. The Court will also approve, disapprove or modify the proposed *Notice* and indicate the date for hearing on the proposed settlement.

4. *Notice.* Class counsel and plaintiffs' counsel shall, within 15 days after the Court's approval of the *Notice of Pendency of Class Action and Hearing on Proposed Settlement*, cause to be mailed to all class members who can be identified through reasonable efforts a copy of said *Notice* as approved by the Court. The *Notice* will describe the proposed settlement reached by the parties and the class representatives and will notify class members of the date, time and place of the hearing on the proposed settlement and their opportunity to attend the hearing and submit written comments.

5. *Hearing on proposed settlement.* Upon certification to the Court by counsel that the *Notice* has been mailed to all class members, the Court will hold a hearing on the proposed settlement on a date to be set by the court, which date will be set forth in the *Notice*. The purpose of the hearing will be to consider whether the settlement should be given final approval by the Court. Objections to the proposed settlement

will be considered if filed in writing with the Clerk on or before the date 10 days prior to the hearing date. Class members may be heard orally in support of or in opposition to the proposed settlement provided they have notified the Clerk, in writing received by the date 10 days prior to the hearing date, of their intention to appear at the hearing. Counsel and the class representatives will respond at the hearing to any objections to the proposed settlement raised by class members.

6. *Further orders of the Court.* The Court will consider the objections to the proposed settlement raised by class members at the hearing or in written comments, and will thereafter make a final ruling on the proposed settlement. In the event the Court does not approve the proposed settlement, the Court will entertain the parties' written submissions on any remaining matters concerning class certification and discovery, issue amended class certification and discovery orders, if any, and set the case for trial.

February 9, 1999

/s/ _____

UNITED STATES DISTRICT JUDGE

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---
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By Federal Express

April 20, 1999

Hon. J. Frederick Motz
United States District Judge
District of Maryland
United States Courthouse
Room 510
101 W. Lombard Street
Baltimore, MD 21201

Re: *Scardelletti v. Santoro, Sr.*, No. JFM-97-3464

Dear Judge Motz:

This is to advise that the relationship between the above entitled litigation before Your Honor and the claims of Mr. Devlin as previously asserted in the United States District Court for the Southern District of New York concerning the elimination of the cost of living adjustment ("COLA") in the TCU Retirement Plan was referred to by Judge Oakes in his opinion for the United States Court of Appeals for the Second Circuit on April 13, 1999, along with other issues not involved in the litigation before Your Honor. Judge Oakes' opinion is attached as it specifically refers to the litigation before Your Honor at pages 23-25. (Exhibit A attached hereto.)

The Second Circuit's decision was based on the finding that at the time that the United States District Court for the Southern District of New York made its initial ruling, the COLA amendment had not yet been repealed.

Judge Oakes concluded that since the same COLA issue was being addressed by Your Honor that "It seems eminently sensible that the Maryland District Court should resolve fully the COLA amendment issue." (Exhibit A, p. 24.) In his opinion, Judge Oakes also indicated that Mr. Devlin could intervene to resolve his claims with regard to the COLA Amendment in the litigation before Your Honor pursuant to Federal Rule of Civil Procedure 24(a). (Exhibit A, p. 25).

It is therefore respectfully requested that Mr. Devlin be permitted to intervene in the case *Scardelletti v. Santoro, Sr., No. JFM-97-3464* pursuant to Fed. R. Civ. P. 24 (a) or in the alternative Rule 24(b). Rule 24(a) provides that a party shall be allowed to intervene in an action if they claim an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action as a practical matter may impair or impede his ability to protect that interest, unless his interest is adequately represented by the existing parties. Fed. R. Civ. P. 24(a).

Recent developments have come to Mr. Devlin's attention in connection with the case before Your Honor that make it imperative that he follow the suggestion in the opinion by Judge Oakes and now seek to intervene pursuant to Rule 24(a) to protect his interests and those of the approximately 400 members of the Retired Employees Protective Association ("REPA") whom he represents as their President.

The qualifications of Mr. Devlin to represent such interests in this case have already been acknowledged by the plaintiffs in their Complaint for Declaratory and Injunctive Relief initiating the pending litigation dated October 17, 1997. (Exhibit B, ¶ 17, annexed hereto.)

* * *

Finally, we respectfully request that a telephonic pre-trial conference pursuant to Fed. R. Civ. P. 16 be granted so that we may discuss the issues and terms relating to such intervention in connection with the present procedural posture of the case.

Respectfully submitted,

/s/ Arthur M. Wisehart
ARTHUR M. WISEHART
Attorney for Robert J. Devlin,
President
Retired Employees' Protective
Association

Retired Employees Protective Association (REPA)
342 Fifth Avenue, River Edge, N.J. 07661-1113
(201) 261-1788 Fax (201) 599-2102

January 26, 1999

BY FAX (202) 328-7030 & US MAIL

Barbara Kraft, Esq.
Beins, Axelrod & Kraft
Suite 704
1717 Massachusetts Avenue, NW
Washington, DC 20036-2001

Re: *Scardelletti, et al., v. Santoro, et al.*,
C.A. No. JFM-97-3464

Dear Ms. Kraft

Thank you for furnishing a copy of your letter of January 22, 1999, to William F. Hanrahan, Esq., Counsel for plaintiff in which you seek plaintiffs response to your alternative settlement proposal of December 10, 1998.

You know that the COLAs cannot be taken away by Plan amendment because no application was ever made to or approval granted by the Secretary of the Treasury. This is REPA's position now pending in the U.S. Court of Appeals for the Second Circuit. This is also what you stated to be your position as well as plaintiffs' being barred by laches and estoppel from asserting a claim for relief in the Baltimore Court and that the Baltimore court is without jurisdiction.

You already know REPA's position that the current TCU proposal and your counter-proposal for settlement are simply unacceptable. It further is unacceptable that you would engage in any such settlement discussions while the COLA matter is pending in the Second Circuit seeking complete restitution of all benefits denied to retirees.

You are requested on behalf of approximately 400 members of REPA that you make it clear that you do not

represent us and that any such settlement discussions should be tabled until after we have the benefit of the Second Circuit's decision on the currently pending appeal. Anything less would be contrary to the interests of TCU Staff Retirement Plan participants, and REPA will hold you accountable for any injury that may result.

Yours truly,

/s/ R. J. Devlin
Robert J. Devlin, President

CC: Arthur M. Wisehart, Esq.

Retired Employees Protective Association (REPA)
342 Fifth Avenue, River Edge, N.J. 07661-1113
(201) 261-1788 Fax (201) 599-2102

December 22, 1998

Ms. Barbara Kraft, Esq.
Beins, Axelrod & Kraft
Suite 704
1717 Massachusetts Avenue, NW
Washington, D.C. 20036-2001

Re: *Scardelletti v. Santoro*, C.A. No. JFM-97-3464

Dear Ms. Kraft:

Thank you for your letter of December 16, 1998, and the proposed Order for Judge Motz for conditional certification and your alternative settlement proposal.

While I will not quarrel with your understanding of our November 29, 1998, conversation, there is one aspect you did not address. That is, you advised that you had retained an actuary to make a cost evaluation of TCU's offer and you would furnish a copy to me. I would appreciate receiving a copy of this evaluation and the name of the Actuary who prepared it.

Your proposed offer of settlement, in view of the prior offer in settlement of 95-52, which I understand is now consolidate with 97-3464, is unbelievably adverse to our interests and appears to me to be a "Sweetheart deal." It also rings of a scheme to hold out a lump sum settlement in order to coerce the vote of aging and frightened retirees who are struggling to survive on drastically reduced retirement benefits. In their anxiety, the lump sum amount might appear to be a temporary solution to meet their mounting unpaid grocery and rent bills or saving them the necessity of moving from their lifetime homes to take up residence with children or to some less expensive accommodation. These fears and

anxieties are not fantasy, but are actual heart wrenching facts expressed personally to me. Some have even expressed the wish that death arrives before the next embarrassment does.

I am also concerned that this proposed settlement is an effort to adversely influence the retirees case presently before the United States Court of Appeals for the Second Circuit where, among other things, the COLA issue is pending. It might also be an effort to h[ ]ily conclude this matter to coincide with the proposed settlement agreement in JFM 95-52, with respect to the former Plan trustees.

I am enclosing a copy of a letter from our Attorney Mr. Wisehart apprising Judge Motz of the recent developments.

Instead of proceeding with any such settlement of the COLA elimination dispute that at one time all parties including, TCU, the participant retirees and Judge Motz agreed would be illegal, my request on behalf of approximately 400 members of REPA is that Judge Motz be asked to defer any action thereon until after the Second Circuit decision in the pending appeal has been received.

Yours truly

/s/ R. J. Devlin
Robert J. Devlin, President

cc: *By Fax & U.S. Mail*
Arthur M. Wisehart, Esq.
19 West 44th Street
Suite 412
New York, N.Y. 10036-5993

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JFM 97-3464

SCARDELLETTI, et al.
Plaintiffs,

vs.

DEVLIN, *et al.*
Defendants.

Motions hearing was held in the above referenced case on June 5, 1998 before the Honorable Frederick Motz.

* * *

THE COURT: I can tell you my tentative views and then give you how—I got some questions, but it seems to me clearly that the Motion to Dismiss for Transfer by Mr. Devlin should be denied. I think this case is rather clearly properly here.

* * *

MR. WISEHART: But, you know, I have put in my papers what the physical problems are, and I know Your Honor has read them and I know Your Honor has given all of that careful consideration, and—

THE COURT: I am sympathetic to Mr. Devlin, but there are other weight on the other side, and the fact of the matter is, I have been familiar with this, you know, whether we formally consolidate or not, it is in everybody's interest this get resolved one way or the other as soon as possible and it is much more likely it will be done here.

* * *

THE COURT: This gets to questions of adequacy of representation. It gets to Mr. Devlin doesn't want to be here. It is certainly not inappropriate that you pick Mr. Devlin as the representative of his class since he had filed suit against you all in the Southern District of New York and so it doesn't look collusive, and I also assume, and correct me if I am wrong, that any argument that would be made by Mr. Devlin's class, Mr. Bobo has equal, the Bobo defendants in the Bobo suit have equal incentive to make the same argument.

* * *

THE COURT: I guess what I am interested in knowing, I want vigorous arguments on those issues. On the retirement subsidy issue, will you be weighing in heavily?

MR. JOHNSON: The only thing we will be weighing in heavily for is that the COLA was void. Ab Initio.

THE COURT: So what I need is somebody who is going to effectively and adequately argue that it was not Ab Initio, void Ab Initio and it was a retirement type benefit and that is presumably to Mr. Devlin's—benefit to Mr. Devlin—

MR. WISEHART: It sounds like it, Your Honor. Specifically on this Ab Initio point, no offense to the Court, I mean it is very congenial here, but it is something that I really know very little about at this point.

THE COURT: Frankly, that is what worries me.

MR. WISEHART: I know something, quite a lot about the accrued benefit point.

THE COURT: And with that frank admission that is exact' vhat concerns me. I am not sure whether or not I have a. .dequate representative of the Devlin class.

MR. WISEHART: And resources, what am I going to do? I have a very small office. It is difficult, and I gather

from what has been said that there already has been a lot of litigation history which brings it to this point on the void Ab Initio issue.

THE COURT: Find another Devlin class rep by other counsel who could argue those positions more vigorously?

* * *

THE COURT: Tell me when you are all ready, and frankly counsel as well as representative, I want somebody to come in here who really knows what they are doing in this area. I am not saying that you don't, but you just told me on this Ab Initio, and I need to—

MR. HANRAHAN: I understand.

THE COURT: I have an obligation here in terms of the class action.

MR. HANRAHAN: Thank you.

(Recess.)

THE COURT: I am sorry to throw a monkey wrench in this.

MR. HANRAHAN: We are prepared to try to address the Court's concerns, and we see it as follows. We would try to select another class representative and name that person as a defendant in the actions. It would be someone with characteristics similar to Mr. DeBarr and to Mr. Devlin that they have held some responsible position. Someone with some responsibility of wordly business. Name that person in an amended complaint and advise the individual that counsel fees, reasonable counsel fees for an attorney would be paid. If the individual seeks advice with respect to counsel would be prepared to recommend some knowledgeable lawyer that would be suitable for the representation and I think we can do this very expeditiously because we would like to see this brought to a conclusion as rapidly as possible.

* * *

THE COURT: If you do that, name the new representative of the retiree sub class, I guess the Motion to Dismiss the Transfer becomes moot, isn't it?

MR. HANRAHAN: Yes. We think so.

THE COURT: I will deny it today. I will deny it today in any event, but I deny the Motion to Dismiss the Transfer.

MR. WISEHART: Your Honor, with respect to that, since the motion has been denied, but in terms of the discussion as you have heard today, I assume that Mr. Devlin will not continue to be a party?

THE COURT: I think that is what will happen. After the motion to amend Mr. Devlin will no longer be a party.

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By Federal Express

May 12, 1999

Hon. J. Frederick Motz
United States District Judge
District of Maryland
United States Courthouse
Room 510
101 W. Lombard Street
Baltimore, MD 21201

Re: *Scardelletti et al. v. Santoro, Sr.*,
No. JFM-97-3464

Dear Judge Motz:

As Your Honor will recall, we wrote on April 20, 1999, to request a pretrial conference in the above entitled litigation pursuant to Fed. R. Civ. P. 16 so that the intervention of Mr. Devlin and the Retired Employees Protective Association ("REPA") of approximately 400 members could be considered in light of the recent decision of the United States Court of Appeals for the Second Circuit dated April 13, 1999 in *Devlin et al. v. Transportation Communications International Union and Robert A. Scardeletti* in Second Circuit Docket No. 98-7237 (copy attached for convenient reference).

We still await a response from Your Honor concerning the foregoing request.

* * *

For all of the foregoing reasons it is respectfully requested that the requested conference be scheduled as soon as that can be done on the basis of Your Honor's calendar.

Respectfully submitted,

/s/ Arthur M. Wisehart
ARTHUR M. WISEHART
Attorney for Mr. Devlin and REPA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et. al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et. al.*,
Defendants.

Plaintiffs' Motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class And Set a Date for a Hearing to Determine Whether The Proposed Settlement Should be Approved

Plaintiffs, the Trustees of the Transportation Communications International Union Staff Retirement Plan (the "Trustees" and the "Plan", respectively) seek an order (1) modifying the February 9, 1999 conditional order certifying a defendant class composed of two subclasses; (2) making a preliminary determination that the proposed settlement of this action is within a range of reasonableness warranting the distribution of a notice of settlement to the class; (3) approving the proposed notice to the class, attached hereto as Exhibit 1; and (4) setting a date for a hearing to determine whether the proposed settlement should be approved. The reasons for granting these requests are set forth in the accompanying memorandum of law.

Respectfully submitted,

Dated: August 26, 1999 /s/ _____

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LONIE A. HASSEL
(Federal Bar No. 012246)
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION AND SETTLEMENT HEARING

TO: ALL ACTIVE, TERMINATED VESTED AND RETIRED PARTICIPANTS AND THEIR BENEFICIARIES IN THE TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION STAFF RETIREMENT PLAN, EXCEPT R.A. SCARDELLETTI, FRANK FERLIN, JR., JOEL PARKER, DON BUJOLD, HOWARD RANDOLPH, MITCHELL M. KRAUS, DONALD A. BOBO, R.I. KILROY, F.T. LYNCH AND FRANK MAZUR.

PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. YOUR RIGHTS MAY BE AFFECTED BY THIS CLASS ACTION LITIGATION. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF THIS ACTION AND CONTAINS IMPORTANT INFORMATION ABOUT YOUR RIGHTS. IF YOU ARE A MEMBER THE CLASS, YOU MAY BE ENTITLED TO RECEIVE AN INCREASE IN PENSION BENEFITS PURSUANT TO THE PROPOSED SETTLEMENT.

EXHIBIT 1

THIS NOTICE IS TO INFORM YOU OF:

1. THE PROPOSED SETTLEMENT OF THE CLAIMS ASSERTED IN THIS ACTION CONCERNING THE AUTOMATIC COSTS OF LIVING ADJUSTMENT ADOPTED EFFECTIVE JANUARY 1, 1991;

2. A HEARING TO BE HELD ON _____ AT _____ _.M. IN COURTROOM ___ OF THE UNITED STATES COURTHOUSE, 101 W. LOMBARD STREET, BALTIMORE, MARYLAND 21201 TO DETERMINE WHETHER THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT, AND WHETHER AN ORDER SHOULD BE ENTERED APPROVING THE SETTLEMENT AND GRANTING THE EQUITABLE RELIEF REQUESTED BY THE PLAINTIFFS IN ACCORDANCE WITH THE SETTLEMENT; AND

3. YOUR RIGHT, IF YOU ARE A MEMBER OF THE CLASS, TO PRESENT YOUR VIEWS TO THE COURT.

* * *

V. Effective Date of the Settlement

This settlement is contingent upon the following things occurring. First, the Court must examine the terms of this settlement and consider any objections to the settlement that may be made by an member of the Class. Second, if the Court determines that the settlement should be approved, it will enter an order approving the settlement and dismissing this action. If no appeal is filed from the order approving the settlement, the settlement agreement will become fully

effective once the time for filing an appeal (usually 30 days) has expired. The Plan will then promptly make the increases in pensions called for by this settlement and make any retroactive payments required. However, if an appeal is filed, the settlement will remain contingent until all appellate proceedings are concluded. Therefore, if an appeal is taken, it may be several months before the settlement becomes final, assuming the appellate court also approves the settlement.

VI. Payment of Attorneys' Fees

At the outset of the Action, TCU advised Mr. DeBarr, the Active Subclass Representative, that inasmuch as he was being called upon to serve as a representative of the subclass that consists primarily of TCU's active employees and their beneficiaries, and because TCU is concerned that all employees have adequate representation, TCU would undertake to compensate counsel for the Active Subclass for the reasonable fees and expense of this litigation. Mr. DeBarr consented to this arrangement.

With the consent of Mr. Santoro, the Retiree Subclass Representative, the Plan similarly agreed to pay reasonable counsel fees for counsel for the Retiree Subclass. These fee arrangements were disclosed to the Court in the Trustee's memorandum in support of the motion for class certification, which was conditionally granted on February 9, 1999.

Counsel for the Active and Retiree Subclasses are compensated on an hourly basis and will not receive a share of any settlement. Thus, will the value of the settlement for the Active and Retiree Subclasses is more than $8 million, the fees that will be paid to counsel for the Active and Retiree Subclasses are estimated to total less than $100,000.

VII. Election by Class Members

If you are a member of the Class, *you do not need to take any action* and your rights will be represented by your Subclass Representative and counsel. If you wish, you may

enter a legal appearance individually or through your own counsel at your own expense. As a member of the Class, however, you do not have to do anything further to participate in the benefits to Class members from this settlement.

Class members have no right to exclude themselves from the Class.

VIII. Court Hearing on the Proposed Settlement and Your Rights With Respect to the Settlement

Any member of the Class may, but need not, enter an appearance in the Action either personally or through counsel of his or her choice. Any member of the Class who enters an appearance may be responsible for his or her own attorneys' fees and expenses. Any member of the Class who does not enter an appearance through counsel in the Action will be represented by counsel for his or her Subclass.

A hearing (the "Hearing") will be held on _____, 1999 at ____ _.m. (or at any such adjourned time or times that the Court may without further notice direct) in Courtroom ____ of the United States Courthouse, 101 W. Lombard Street, Baltimore, MD 21201 to consider, among other things, whether the settlement of the Action pursuant to the terms and conditions set forth in the Settlement Agreement and summarized in this Notice should be approved as fair, reasonable and adequate to the members of the Class and whether an order should be entered approving the settlement and granting the equitable relief requested by the Trustees in accordance with the settlement.

The Hearing may be postponed, adjourned or rescheduled by order of the Court without further notice to the members of the Class.

If you are a member of the Class, you are entitled to object, if you so desire, to the proposed settlement. Objections by members of the Class to the settlement will be heard separately at the same Hearing and any papers submitted in

support of the objections will be received and considered by the Court at the Hearing. No person shall be heard, however, unless he or she gives written notice of his or her intention to appear and object (which shall set forth briefly each objection and the basis therefor) and files the notice on or before _____, 1999, with the Clerk of the United States District Court for the District of Maryland, United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland, 21201, and sends a copy of the written notice and of any papers in support of his or position by first class mail, postage pre-paid; over night delivery service; or messenger on or before _____, 1999 to each of the following attorneys:

Counsel for Plaintiffs:

WILLIAM F. HANRAHAN
GROOM LAW GROUP, CHTD.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Counsel for the Retiree Subclass:

BARBARA KRAFT
BEINS, AXELROD & KRAFT, P.C.
1717 Massachusetts Ave., N.W.
Suite 704
Washington, D.C. 20036

Counsel for the Active Subclass:

KENNETH JOHNSON
TUGGLE, DUGGINS & MESCHAN, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, North Carolina 27402

All written notices of objection must identify clearly any and all witnesses, documents and other evidence of any kind that are to presented at the Hearing and also must set forth the substance of any testimony to be given by witnesses. Objections and other papers should refer to *Scardelletti v.*

Santoro, Civil Action No. JFM-97-3464, and must show proof of service on each of the counsel listed in the preceding paragraph.

Any member of the Class who does not make his or her objection or opposition to the matters described in the Notice in the manner provided in this Notice shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters.

IX. Examination of Papers and Questions

For a more detailed statement of matters referred to in this Notice, including the details of the settlement, releases and other important matters, Class Members are invited to inspect the Complaint, Settlement Agreement and all other papers filed in the Action in the Office of the Clerk, United States District Court for the District of Maryland, 101 W. Lombard Street, Baltimore, Maryland 21201, during regular business hours of each business day.

QUESTIONS SHOULD NOT BE DIRECTED TO THE COURT.

Instead, Retiree Subclass members should contact:

BARBARA KRAFT
BEINS, AXELROD & KRAFT
1717 Massachusetts Ave., N.W.
Suite 704
Washington, D.C. 20036
(202) 328-7222

and Active Subclass member should contact:

KENNETH JOHNSON
TUGGLE, DUGGINS & MESCHAN, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, North Carolina 27402
(336) 378-1431

Dated: _____

BY ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

_____
Clerk of the Court
United States District Court
for the District of Maryland

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.
JFM-97-3464

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

NOTICE OF CROSS-MOTION

PLEASE TAKE NOTICE THAT, upon the affidavit of Robert J. Devlin sworn to September 9, 1999, and the accompanying Memorandum of Law, Robert J. Devlin, a member of the PURPORTED subclass of retirees, on behalf of himself and on behalf of the Retired Employees Protective Association ("REPA"), of which he is President, will move this Court at the United States Courthouse, 101 West Lombard Street, Baltimore, Maryland, Room 5A, before the Honorable J. Frederick Motz, U.S.D.J., for an Order (a) dismissing, denying or striking plaintiffs' Motion to Modify the Class Certification Order, Preliminarily Approve the Proposed Settlement, Approve the Proposed Notice to the Class and Set a Date for a Hearing to Determine Whether the Proposed Settlement Should be approve dated August 26, 1999, pursuant to Fed.R.Civ.P. 23(a) and (d) and 28 U.S.C. § 1927, (b) granting leave to move to intervene pursuant to Fed.R.Civ.P. 24(a) and (b), and (c) providing such other and further relief as to this Court may seem just and proper, including attorney's fees, costs and reasonable expenses.

PLEASE TAKE FURTHER NOTICE THAT, pursuant to Fed.R.Civ.P. 6(e), and Local rule 105 (2), answering papers, if any, are required to be served upon counsel listed below on or before September 24, 1999, and reply papers are to be served on or before October 4, 1999.

Dated: September 9, 1999

/s/ _____
ARTHUR M. WISEHART (AMW 4003)
WISEHART & KOCH
19 W 44th Street, Suite 412
New York, New York 10036
(212) 730-0044

/s/ _____
TRAVIS MASTRODDI (25164)
KAHN, SMITH, & COLLINS
201 North Charles Street, 10th Floor
Baltimore, Maryland 21201
(410) 244-1010

Attorneys for Robert J. Devlin
And the
Retired Employees Protective Association

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.
JFM-97-3464

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

AFFIDAVIT OF ROBERT J. DEVLIN
IN SUPPORT OF CROSS-MOTION

STATE OF NEW YORK
COUNTY OF NEW YORK—ss. :

ROBERT J. DEVLIN, being duly sworn, deposes and says:

1. This affidavit is respectfully submitted on the basis of personal knowledge as a former officer and employee of the Transportation Communications International Union ("TCU") entitled to benefits under the TCU Staff Retirement Plan, and as President the Retired Employees Protective Association ("REPA") consisting of approximately 400 persons who are former employees and participants, or their beneficiaries, of their pensions thereunder.

2. This affidavit is respectfully submitted in support of a cross-motion to dismiss, deny and strike a motion dated August 26, 1999, and filed August 27, 1999, seeking an order concerning certain provisions with respect to a proposed settlement of the above entitled action.

3. The motion regarding the proposed settlement was not served upon me or my attorney. I learned of the existence of the motion only when I learned of a rumor concerning it. Thus, I was forced to call Documents Technology, Inc., and through the assistance of that firm, a copy of the motion papers were received by me on September 4, 1999.

4. The fact that a copy of the motion was not served upon me by the counsel involved is particularly outrageous because Barbara Kraft, Esq., is listed as counsel for the Retiree Subclass at page 19 of the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing attached to the motion dated August 26, 1999. I have written to Ms. Kraft frequently on behalf of the members REPA regarding our concerns and objections to any such settlement, and my interest in the subject of the motion therefore was clearly known to the counsel involved. I therefore am forced to conclude that the intention of counsel to exclude me from being served with a set of the motion papers was deliberate.

5. The grounds of the cross-motion include:

(a) the bad faith of those making the motion, and their responsibility therefor under 28 U.S.C. § 1927;

(b) the disabling conflicts of interests of the attorneys making the motion;

(c) the improper interference of those attorneys and those responsible for making the motion with case currently pending in the United States District Court for the Southern District of New York before Hon. John F. Keenan, U.S.D.J., entitled *Devlin, et al. v. Transportation Communications International Union and Robert A. Scardelletti, International President*, 95 Civ. 0742, 95 Civ. 10838 (JFK) [Consolidated];

(d) the denial of due process to my self and members of REPA in connection with the making of the motion in this Court; and

(e) requesting leave to intervene pursuant to Fed.R.Civ.P. 24.

6. As this Court will recall, I previously was named as a party defendant in an action commenced in this Court and objected to such status primarily because of lack of resources and because of my pending litigation in the United States District Court in the Southern District of New York.

7. My affidavit in opposition dated March 31, 1998, is annexed hereto as Exhibit A.

8. On June 5, 1998, a hearing was conducted in this Court regarding the matter and the transcript of the hearing prepared by the Official Court Reporter is annexed hereto as Exhibit B.

9. As shown in the transcript, the Court specifically inquired about whether it would be possible for my counsel and myself to vigorously litigate the issue of whether or not the COLA amendments to the TCU Retirement Plan were *void ab initio* (TR 6/5/98, pp. 19-20):

"MR. JOHNSON: The only thing we will be weighing in heavily for is that the COLA was void Ab Initio.

"THE COURT: So what I need is somebody who is going to effectively and adequately argue that it was no Ab Initio, void Ab Initio and it was a retirement type benefit and that is presumably to Mr. Devlin's—benefit to Mr. Devlin—

"MR. WISEHART: It sounds like it, Your Honor. Specifically on this Ab Initio point, no offense to the Court. I mean it is very congenial here, but it is something that I really know very little about at this point.

"THE COURT: Frankly, that is what worries me.

"MR. WISEHART: I know something, quite a lot about the accrued benefit point.

"THE COURT: And with that frank admission that is exactly what concerns me. I am not sure whether or not I have an adequate representation of the Devlin class.

"MR. WISEHART: And resources, what am I going to do? I have a very small office. It is difficult, and I gather from what has been said that there already has been a lot of litigation history which brings it to this point on the void Ab Initio issue.

"THE COURT: Find another Devlin class rep by other counsel who could argue those positions more vigorously?

"MR. WISEHART: They would have to be in this case I think.

"THE COURT: Wait. They could or couldn't? That is the very problem. They can pick the defendant. They picked you for reasons which nobody can ever call collusive because you sued them in the Southern District of New York, so Mr. Devlin was a natural defendant in the action here, so now we get into the more dangerous area where you would pick another defendant, but frankly from my point of view, I wan vigorous representation on these issues by the members of what are right now the Devlin sub class.

"MR. HANRAHAN: Judge Motz, Mr. Scardelletti is here today, he is the chairman of the board. I wonder if I could have a minute to talk to him?

"THE COURT: You want a short recess?

"MR. HANRAHAN: That would be good.

"THE COURT: Tell me when you are all ready, and frankly counsel as well as representative, I want somebody to come in here who really knows what they are doing in this area. I am not saying you don't, but you just told me, on this Ab Initio, and I need to --

"MR. HANRAHAN: I understand.

"THE COURT: I have an obligation here in terms of the class action.

"MR. HANRAHAN: Thank you."

10. On that basis, the Court acceded to the request of counsel for the plaintiffs to appoint another attorney to represent the class and Scardelletti et al., even agreed to compensate such counsel in connection with such representation even though they had been unwilling to provide the resources necessary for the representation of myself and the other REPA members in this Court.

11. The counsel that they chose for such purpose was Barbara Kraft, Esq.

12. Further, the class representative rather than myself who was chosen was Anthony Santoro, Sr.

13. As it turned out, we later learned that both Barbara Kraft, Esq., and Mr. Santoro also were disabled as a result of conflicts of interest.

14. When I sought to obtain additional information from Ms. Kraft, however, it was not provided, although my requests had been made as soon as the matter was brought to my attention, as shown in the letters dated 2/23/99, 3/22/99, 4/7/99, 4/21/99, and 4/26/99, annexed hereto as Exhibits C; D; E; F and G, respectively.

15. The outrageousness of the continuing representation of Ms. Kraft of the purported class in shown by the fact that it is believed that the members of REPA are by far the large

majority of those in the class that Ms. Kraft purports to represent.

16. REPA has approximately 400 members and their beneficiaries and the class that Ms. Kraft purports to represent is approximately the same size and involves the same persons.

17. The purported representation of the class by Ms. Kraft therefore constitutes a perversion of the class action system as provided in the Federal Rules of Civil Procedure.

18. The motion purportedly made on behalf of that class by Barbara Kraft therefore is a nullity because she does not in fact represent that class or the members of the class or the persons having an interest in the class. The interests she represents in reality are the plaintiffs in this action because it is their interests that she seeks to promote by making a motion contrary to my view previously expressed to her in the letters annexed hereto as Exhibits C, D, E, F and G.

19. In fact the proposed settlement is much inferior to what she had previously advocated in correspondence with me dated December 16, 1998. (Exhibit H annexed hereto.)

20. The bad faith of the attorneys involved in making the instant motion is further shown by the fact that the issue of whether the COLA amendments were or were not *void ab initio* which the Court emphasized at the hearing June 5, 1998, as being of the utmost importance in connection with the representation of the class was never resolved or even addressed after Mr. Santoro and Ms. Kraft were put forward as representatives of the class.

21. The bad faith of Ms. Kraft and Mr. Hanrahan in making the instant motion is also shown by its relationship to the litigation pending in the United States District Court for the Southern District of New York.

22. The motive of improperly interfering with the pendency of that litigation is shown by a simple recitation of the following events:

(a) The litigation in New York was based upon two separate complaints previously filed in that Court, the dismissal of which was reversed in decisions by the United States Court of Appeals for the Second dated April 13, 1999, herein (Exhibits I and J annexed hereto).

(b) Following the decisions of the United States Court of Appeals for the Second Circuit a Pre-Trial conference was held before the District Court on June 9, 1999, at which it was agreed by all counsel that the two cases would be consolidated under a stipulation of consolidated that was "so ordered" by Judge Keenan on June 21, 1999, by Judge Keenan as shown in Exhibit K annexed hereto.

(c) Pursuant thereto, plaintiffs therein including myself made a motion for permission to amend the complaint therein consolidating the two actions and the proposed Amended Consolidated Complaint is annexed hereto as Exhibit L.

(d) The motion to amend the complaint is currently under consideration by Judge Keenan, the final papers in connection therewith having been filed on July 9, 1999.

(e) My reply affidavit of August 12, 1999, that Mr. Hanrahan and the counsel for Mr. Scardelletti in the New York action had wrongfully interfered with the pendency of the motion to consolidate by submitting an affidavit from Mr. Hanrahan in which he referred to the purported settlement and the release clause in that agreement. My reply affidavit is annexed hereto as Exhibit M.

23. The release provisions relied upon by Mr. Hanrahan as well as the release proposed as a part of the settlement in this litigation (proposed Settlement Agreement and Release paragraphs 7-9 demonstrates beyond any doubt the bad faith of the movants herein consists of because such release would have the effect of eliminating the claims pending before Judge Keenan in the United States District Court of the Southern District of New York.

24. Thus the hurried attempt by the plaintiffs herein and their counsel is for the purpose of denying due process to myself and the other members of REPA with their right to prosecute their claims in the United States District Court for the Southern District of New York.

25. Finally, the opinion of the United States District Court for the Second Circuit, indicates that we would be entitled to seek to intervene before this Court. (Exhibit J, pp. 24-25.)

26. I have previously written to this Court in letters dated May 12, 1999, and April 20, 1999, Exhibits N and O annexed hereto, respectively, seeking to intervene but received no response from the Court or from opposing counsel.

27. Meanwhile, it appears that the purpose of plaintiffs herein was to subvert the right to intervene by proceeding to negotiate a purported settlement that they knew that REPA and the true members of the class would oppose for the purpose of eliminating their claims in the pending litigation in the United States District Court for the Southern District of New York.

28. Such conspiratorial action should be avoided and the fruit of the poison tree in the form of the instant motion should be denied, dismissed, and stricken.

29. The conflict of interest regarding plaintiff Scardelletti is of particular concern since, in the New York litigation, it

has been held that Mr. Scardelletti, who is a defendant in that litigation, could be sued for breach of fiduciary duty.

30. It therefore is apparent that defendant Santoro in this litigation and his counsel should have asserted a claim against plaintiff Scardelletti, but he has failed to do so and instead is rushing to push through a proposed settlement that would release Scardelletti from "any and all" liabilities.

31. Thus the dominant motive of those entering into the proposed settlement is not to benefit the members of the class that they purport to represent, but to launder the extensive claims that may be asserted against plaintiff Scardelletti, and to impose on the Retirement Plan costs and liabilities that should be the responsibility of plaintiff Scardelletti for his repeated violations of fiduciary duties as well as the liabilities for which Mr. Scardelletti himself may be found liable as reflected in the Amended Consolidated Complaint that is under consideration therein (Exhibit L annexed hereto).

32. That Mr. Scardelletti is subject to extensive liabilities for breaches of fiduciary duties in connection with the mishandling of expenses and funds belonging to the TCU and the Retirement Plan is based upon information that has been supplied to me from official records involving the TCU.

33. Among other things, plaintiff Scardelletti to my personal knowledge is personally responsible for any shortage of assets in the Retirement Plan for the purpose of funding the COLA benefits because in 1987 he was involved in putting through the elimination of the requirement that active employees contribute 6-1/4% of their salaries to help defray pension costs.

34. The involvement of plaintiff Scardelletti in this elimination of resources available to the Retirement Plan was done to enhance his own political status within the TCU, and in furtherance of the increase of his own take-home pay as officer of the TCU, contrary to the best interests of myself

and the other members of REPA, the majority of whom had been required to contribute 6-1/4% of our salaries to the Retirement Plan during the period of our employment.

35. In addition, any shortage of funds on the part of the TCU as referred to in the settlement proposal herein is also attributable to Mr. Scardelleltti because of his own pattern or practice of using funds of the union to defray his personal expenses and to support his own lavish life-style as documented by the United States Department of Labor, an issue that has been permitted to linger on by the officers of the TCU under the control of plaintiff Scardelletti without ever being resolved.

THE IMPORTANCE OF INTERVENTION

36. A letter from me to Barbara Kraft, Esq., dated April 21, 1999, demonstrates the importance of intervention in this litigation at this time (Exhibit F annexed hereto).

37. In that letter to Ms. Kraft, I requested that she both support our intervention in this litigation and our request for the immediate issuance of a preliminary injunction so that the COLA benefits could be restored at least on a temporary basis.

38. The importance of such a remedy is indicated by the fact that since the elimination of the COLA benefit, approximately 40 members of REPA have been afflicted by the ultimate irreparable injury in that they have passed away so that no remedy could ever make them whole.

39. In a further letter to Ms. Kraft dated April 22, 1999, from Arthur M. Wisehart, Esq., my attorney, the request for a preliminary injunction is again requested so that the continuation of the COLA adjustments would be continued for the time being until further determinations on the merits are made. (Exhibit P annexed hereto.)

40. The request that Ms. Kraft proceed to cooperate in requesting the immediate issuance of a preliminary injunction was repeated in my letter to her dated April 26, 1999 (Exhibit G annexed hereto).

41. Although purporting to represent the class, the fact that Ms. Kraft was not doing so, in fact, is demonstrated by her failure even to respond to the requests that had been made to her regarding her cooperation in seeking the issuance of a preliminary injunction.

42. Instead of proceeding to seek a preliminary injunction, as requested, or even providing the courtesy of a reply, Ms. Kraft proceeded to engage in the negotiation of a settlement proposal on terms that she knew to be opposed by myself and other members of REPA and highly prejudicial to their interests in light of the release provisions contained therein.

43. In order to preserve and reinstate the COLA benefit and prevent further irreparable injury resulting from its elimination, intervention should be granted at this time for that purpose.

44. The fact that the proposed settlement would restore COLA benefits is itself indicative of a determination that the funds in the Retirement Plan are sufficient to restore COLA benefits pursuant to a preliminary injunction to restore the status quo until further determinations on the merits are made.

WHEREFORE, the cross-motion for an order dismissing, denying or striking plaintiffs' motion, and granting intervention so that a preliminary injunction may be entered to prevent irreparable injury caused by the elimination of COLA benefits should be granted.

Respectfully submitted,

/s/ _____
ROBERT J. DEVLIN

Sworn to before me this
9th day of September, 1999:

/s/ _____
Notary Public

JOAN LIPIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 01LI5031518
Qualified in New York County
Commission expires August 8, 2000

BEINS, AXELROD & KRAFT, P.C.

HUGH BEINS
JONATHAN G. AXELROD
BARBARA KRAFT

AXELROD ADMITTED IN MD

SUITE 704
1717 Massachusetts Avenue
Washington, D.C. 20036-2001

TELEPHONE: 202-328-7222
TELECOPIER: 202-328-7030
EMAIL ADDRESS:
HBAK@JUNO.COM

OF COUNSEL
JOSEPH E. SLATER

December 16, 1998

ROBERT J. DEVLIN
342 Fifth Avenue
Ridge Edge, NJ 07661-1113

Re: *Scardelletti v. Santoro*, C.A. No. JFM-97-3467

Dear Mr. Devlin:

Thank you for your letter of December 7, 1998.

To the extent you letter purports to restate the contents of our earlier phone conversations, the letter's statement that I would not "respond" to a settlement offer until the question of class certification was resolved in not quite accurate. What I thought I told you, and what I meant to convey, was that Judge Motz had put off deciding whether to grant the plaintiffs' motion for class certification until the parties explored the possibility of a settlement. I believe I also told you that I had suggested to Judge Motz that the case should be certified as a class action for purposes of settlement discussions and possible presentation of a settlement offer to Plan participants, as well as for purposes of litigation if settlement efforts were unsuccessful. In any event, I have stated that position to Judge Motz in open court and in telephone conferences with him and other counsel.

Enclosed for your information is a copy of a proposed order I drafted, which also reflects the input of the other parties. This proposed order, or something like it, will probably be presented to Judge Motz for his signature within the next day or two. The proposed order calls for conditional certification of the case as a class action for settlement purposes.

Meanwhile, the actuary I retained reviewed the Plan's actuarial reports and agreed with the Plan actuary's projected costs to the Plan of various scenarios, including maintaining the Plan as it stands effective January 1, 1998, reducing post-1990 retirees/terminated vested employees' benefits by reverting to the terms of the Plan prior to 1/1/91, increasing pre-1991 retirees' benefits by 5%, and limiting post-1990 retirees' to 2 COLA adjustments. Working with my actuary, I developed an alternative proposal, a copy of which is enclosed. The plaintiffs have not responded to my alternative proposal. My actuary has not prepared a written report.

Please call if you have questions regarding the above matters. As you can see from the proposed order, all the retirees will have a chance to express their views on any proposed settlement. Judge Motz will hold a hearing for that purpose, and will also review written comments and objections from individual class members.

Sincerely,

Barbara Kraft

Enclosures: Proposed Order

December 10, 1998 letter B. Kraft to William F. Hanrahan

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

C. A. No. JFM-97-3464

R. A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

ORDER CERTIFYING ENTRY OF CONDITIONAL CLASS ACTION AND DIRECTING SUBMISSION OF PROPOSED SETTLEMENT AND NOTICE TO THE COURT

Upon consideration of plaintiffs' motion for class certification and the responses thereto of the putative class representatives George Thomas DeBarr and Anthony Santoro, Sr., and in accordance with the Opinion granting said motion filed concurrently herewith, it is, subject to alteration or amendment under Fed. R. Civ. P. 23(c) conditionally ORDERED:

1. *Class Certification.* This action, titled *R. A. Scardelletti, et al. v. Anthony Santoro, Sr., et al.*, shall be maintained as a class action. This conditional certification is granted for purposes of the parties' attempts to arrive at a settlement which could subsequently be certified and noticed as a settlement class action. For purposes of this conditional certification, the action shall be maintained on behalf of the following class of defendants:

> All active, terminated vested and retired participants and their beneficiaries in the Transportation Communications International Union Staff Retirement Plan.

> This class shall be further divided into subclasses denominated Subclass 1 and Subclass 2.

Subclass 1 shall consist of two parts, as follows:

> Subclass 1-A will consist of all class members who retired on or after January 1, 1991 and will suffer a loss in their benefits in the event this Court grants the equitable relief sought in the complaint.
>
> Subclass 1-B will consist of all class members who retired prior to January 1, 1991 (and their beneficiaries) whose retirement benefits were reduced as a result of the October 1997 plan amendment eliminating the automatic COLA adjustment to their benefits.

Subclass 2 shall consist of all class members who, based on certain assumptions regarding future compensation and years of service as well as the March, 1998 resolution of the Executive Council of the Transportation Communications International Union, would likely benefit in the event this Court grants the equitable relief sought in the complaint.

The following persons shall be excluded from the class: R. A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Mitchell M. Krause, Donald A. Bobo, R. I. Kilroy, F. T. Lynch and Frank Mazur.

The Court and the parties agree that the passage of time and unanticipated events may affect the determination of whether particular class members are in Subclass 1 or Subclass 2 at any given point in time. The Court and the parties also agree that, should the parties not succeed in reaching a settlement, or should the Court determine not to approve a proposed settlement, the definitions of the class and the two subclasses may be revised.

2. *Class Representative: Class Counsel.* Subject to further order of the Court, Anthony Santoro, Sr. is designated class representative of Subclass 1. George Thomas DeBarr is

designated class representative of Subclass 2. Barbara Kraft is designated counsel for Subclass 1. Kenneth M. Johnson is designated as counsel for Subclass 2.

3. *Submission of proposed settlement and notice to the Court.* By March 1, 1999, counsel and the class representatives shall submit to the Court their proposed settlement of this case and a proposed *Notice of Pendency of Class Action and Hearing on Proposed Settlement* in a form to be agreed upon by the parties. The Court will thereafter determine whether the proposed settlement appears to be within the range of reasonableness and whether it should be submitted to class members for their approval. The Court will also approve, disapprove or modify the proposed *Notice* and indicate the date for hearing on the proposed settlement.

4. *Notice.* Class counsel and plaintiffs' counsel shall, within 15 days after the Court's approval of the *Notice of Pendency of Class Action and Hearing on Proposed Settlement*, cause to be mailed to all class members who can be identified through reasonable efforts a copy of said *Notice* as approved by the Court. The *Notice* will describe the proposed settlement reached by the parties and the class representatives and will notify class members of the date, time and place of the hearing on the proposed settlement and their opportunity to attend the hearing and submit written comments.

5. *Hearing on proposed settlement.* Upon certification to the Court by counsel that the *Notice* has been mailed to all class members, the Court will hold a hearing on the proposed settlement on the date set forth in the *Notice*. The purpose of the hearing will be to consider whether the settlement should be given final approval by the Court. Objections to the proposed settlement will be considered if filed in writing with the Clerk on or before [*the date 10 days prior to the hearing date.*] Class members may be heard orally in support of or in opposition to the proposed settlement provided they have

notified the Clerk in writing received by [*the date 10 days prior to the hearing date*] of their intention to appear at the hearing. Counsel and the class representatives will respond at the hearing to any objections to the proposed settlement raised by class members.

6. *Further orders of the Court.* The Court will consider the objections to the proposed settlement raised by class members at the hearing or in written comments, and will thereafter make a final ruling on the proposed settlement. In the event the Court does not approve the proposed settlement, the Court will entertain the parties' written

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

ORDER CERTIFYING CLASS AND SETTING HEARING ON PROPOSED SETTLEMENT

Upon consideration of plaintiffs' motion to modify the conditional class certification order dated February 9, 1999, to preliminarily approve the proposed settlement, approve the proposed notice to the class, and to set a date for a hearing to determine whether the proposed settlement should be approved ("plaintiffs' motion"), it is hereby ORDERED:

1. *Class Certification.* Civil Action No. JFM-97-3464, styled, *R.A. Scardelletti, et al. v. Anthony Santoro, Sr., et al.*, (the "Action") shall continue to be maintained as a class action against the following Class of defendants:

> All active, terminated vested and retired participants and their beneficiaries in the Transportation Communications International Union Staff Retirement Plan ("Plan").

The order dated February 9, 1999, conditionally certifying the Class and subdividing the Class into Subclass I-A and 1_B and Subclass 2 is hereby modified by eliminating the definitions of the Subclasses, and by subdividing the Class into subclasses denominated the Retiree Subclass and the Active Subclass.

The Retiree Subclass shall consist of all members of the Class who retired or terminated service under the Plan prior to January 1, 1999. The Retiree Subclass has two parts: (1) all class members who retired on or after January 1, 1991 who will suffer a loss in benefits under the Plan in the event the Court grants the relief sought in the Action and (2) all class members who retired prior to January 1, 1991 whose Plan benefits were reduced as a result of the October 1997 amendment eliminating the 1991 COLA.

The Active Subclass shall consists of all members of the Class who had not retired or terminated service under the Plan prior to January 1, 1999.

The following persons shall be excluded from the class: R.A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Howard Randolph, Mitchell M. Kraus, Donald A. Bobo, R. I. Kilroy, F. T. Lynch and Frank Mazur.

3. *Class Representative: Class Counsel.* Anthony Santoro, Sr. is designated Class representative of the Retiree Subclass. George Thomas DeBarr is designated Class representative of the Active Subclass. Barbara Kraft is designated counsel for the Retiree Subclass. Kenneth M. Johnson is designated as counsel for the Active Subclass.

1. The proposed settlement between the plaintiffs and the Defendant Class, as set forth in the Settlement Agreement and Release ("Settlement Agreement") submitted as Exhibit 2 to the plaintiffs' motion, appears, upon preliminary review, to be within the range of reasonableness and accordingly shall be submitted to the Class members for their consideration and for a hearing under Fed. R. Civ. P. 23(e).

4. *Hearing*

(a) A hearing (the "Hearing") will be held on *Friday, November 12*, 1999, at *11:30 a*.m. (or any such adjourned time or times that the Court may without further notice direct) in Courtroom *5A* of the United

States courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201 to consider, among other things, whether the settlement of this action pursuant to the terms and conditions set forth in the Settlement Agreement should be approved as fair, reasonable and adequate to the members of the Class and whether an order should be entered approving the settlement and granting the equitable relief requested by the plaintiffs in accordance with the settlement.

(b) The Hearing may be postponed, adjourned or reschedule by order of the Court without further notice to the members of the Class.

(c) Members of the Class may object to the proposed settlement. Objections by members of the Class to the settlement will be heard separately at the same Hearing and any papers submitted in support of the objections will be received and considered by the Court at the Hearing. No person shall be heard, however, unless he or she gives written notice of his or her intention to appear and object (which shall set forth briefly each objection and the basis therefor) and files the notice on or before *October 18, 1999*, with the Clerk of the United States District Court for the District of Maryland, and sends a copy of the written notice and any papers in support of his or her position by first class mail, postage prepaid; overnight delivery service; or messenger on or before *October 18,* 1999 to counsel for the plaintiffs and counsel for the Subclasses.

(d) All written notices of objection must identify clearly any and all witnesses, documents and other evidence of any kind that are to be presented at the Hearing and also must set forth the substance of any testimony to be given by witnesses. Objections and other papers should refer to *Scardelletti v. Santoro*, Civil

Action No. JFM-97-3464, and must show proof of service on counsel for the plaintiffs and counsel for the Subclasses.

(e) Any member of the Class who does not make his or her objection or opposition to the proposed settlement in the manner provided hereto shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters.

5. *Notice.* Counsel for the plaintiffs, in consultation with counsel for the Subclasses, shall by *September 17,* 1999, cause to be mailed in the name of the Clerk by first class mail, postage prepaid, to all Class members who can be identified through reasonable efforts, a notice in substantially the same form as Exhibit 1 to plaintiffs' motion.

6. *List of Class Members.* Counsel for the plaintiffs, in consultation with counsel for the Subclasses, shall file with the Clerk by *October 1*, 1999, and affidavit identifying the persons to whom notice has been mailed.

Dated: September 14, 1999

/s/_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R. A. SCARDELLETT, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*
Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ROBERT DEVLIN'S MOTION TO INTERVENE AND RESPONSE TO CROSS-MOTION

Robert Devlin, a member of the defendant Retiree Subclass, filed a "Cross Motion" on September 9, 1999 asking the court to permit him to intervene and raising objections to the proposed settlement of this action. Plaintiffs, R.A. Scardelletti, Joel Parker, and Howard Randolph, ask the Court to deny Mr. Devlin's request to intervene as well as the other relief sought in the Cross Motion and to direct Mr. Devlin to raise any objections to the proposed settlement agreement at the fairness hearing in this action scheduled for November 12, 1999.

Preliminary Statement

In October 1997, almost two years ago, the plaintiffs, as Trustees of the Transportation Communications Union International Staff Retirement Plan ("Plan"), commenced this defendant class action. The Trustees named Mr. Devlin as the representative of the Retiree Subclass, consisting of individuals who retired under the Plan before 1991 and their

beneficiaries. The Trustees chose Mr. Devlin because he had brought an action in United States District Court for the Southern District of New York ("New York Action"), nominally on behalf of Plan retirees, challenging, among other things, the elimination of the automatic cost of living adjustment under the Plan that became effective in 1991 ("1991 COLA"). The Trustees thought that, because Mr. Devlin was obviously concerned about the 1991 COLA, had undertaken to represent Plan retirees and had obtained counsel for that purpose, he would be an appropriate representative for the Retiree Subclass in this action.

Mr. Devlin, however, declined to serve as the class representative and asked the Court's permission to withdraw. In support of his request, Mr. Devlin told the Court that he lacked the desire and financial resources to litigate in the District of Maryland. Mr. Devlin's counsel further informed the Court that counsel knew very little about the issue of whether the 1991 COLA could be deemed void *ab initio*, one of the principal issues in this case. For these reasons, the Court approved Mr. Devlin's withdrawal from this action. The Trustees then named Anthony Santoro, Sr. as the replacement representative of the Retiree Subclass. Mr. Santoro agreed to be represented by Barbara Kraft, as counsel for the Retiree Subclass.

Now, after the parties have reached a settlement following months of negotiations supervised by a magistrate judge, Mr. Devlin complains that he is inadequately represented and seeks to intervene, contradicting his earlier position on participating in this action. Even if Mr. Devlin and his counsel's circumstances have changed so that their participation would be appropriate, Mr. Devlin's motion to intervene should be denied. As explained below, Mr. Devlin has not demonstrated that he has a right to intervene under Federal Rule of Civil Procedure 24(a) or that intervention should be permitted under Rule 24(b).

All of the other points that Mr. Devlin raises in his Cross Motion are either utterly irrelevant to any issue presented in this case, or are objections to the proposed settlement. The Notice of Settlement ("Notice") sent to class members, including Mr. Devlin, on September 16, 1999, describes the procedure for raising objections to the proposed settlement. The Trustees reserve their right to respond to Mr. Devlin's objections to the proposed settlement if and when he raises objections in accordance with the procedure described in the Notice.

ARGUMENT

I. Mr. Devlin Is Not Entitled To Intervene

To intervene as of right, Mr. Devlin must make a timely application to intervene, claim "an interest relating to the transaction which is the subject of the action" and demonstrate that "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. Rule Civ. P. 24(a)(2). "'The district court is entitled to the full range of reasonable discretion in determining whether these requirements [of Rule 24(a)(2)] have been met.'" *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (quoting *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638*, 520 F.2d 352, 355 (2d Cir. 1975)).

Mr. Devlin is not entitled to intervene under Rule 24(a)(2) because his request to intervene is untimely and because Retiree Class representative, Mr. Santoro, and class counsel, Ms. Kraft, adequately represent Mr. Devlin's interests.

A. Mr. Devlin's Motion To Intervene Is Not Timely.

"The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). To determine the timeliness of an intervention motion, a "court should look at how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene." *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990). Thus, a key factor courts examine is the proximity of a motion to intervene to a tentative settlement of the action, because of the prejudice the intervention would cause the existing parties. *See Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 530 (9th Cir. 1984) (motion to intervene as of right was not timely when sought shortly before the parties agreed to a settlement); *County of Orange v. Air California*, 799 F.2d 535, 537-538 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (motion to intervene as of right filed a few days after the parties had advised the district court of their settlement was not timely).

In assessing a belated applicant's reason for delay in moving to intervene, courts recognize that "[a] party seeking to intervene must act as soon as he 'knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.'" *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990), *cert. denied sub nom. Makah Indian Tribe v. United States* 501 U.S. 1250 (1991) (delayed motion to intervene not timely where the potential intervenors inquired about the negotiations concerning the administrative plan settling the action and attempted to participate in the negotiations); *see also County of Orange v. Air California*, 799 F.2d at 538 (motion filed after learning of proposed settlement not timely where potential intervenor should have known that existing parties might settle the action).

Mr. Devlin's motion to intervene is untimely because of the late stage of this proceeding, the prejudice that would result to the existing parties and Mr. Devlin's failure to seek intervention as soon as he had reason to know his interests could be adversely affected. The parties have signed a settlement agreement and a fairness hearing on the settlement has been scheduled for November 12, 1999. The parties are very close to concluding the action. It is simply too late in the proceedings to intervene without undoing the progress that the parties have made over the past two years.

Intervention would, as a practical matter, require the parties to turn the clock back to October 1997, when this case was filed. This would prejudice the parties in two ways. As Mr. Devlin himself has noted, this action already has outlived some members of the Retiree Subclass. Further delay could deprive even more members of the Retiree Subclass of the benefit improvements that would be provided under the proposed settlement. In addition, both plaintiffs and defendants would be harmed by the further and unnecessary expenditure of funds to address Mr. Devlin's belated injunction motion raising issues the parties already have resolved through settlement negotiations.

Moreover, Mr. Devlin inexcusably delayed seeking intervention until long after he had reason to know that his interests might be adversely affected in this action. The Trustees initially named Mr. Devlin as the Retiree Subclass representative in October 1997, and the Court advised Mr. Devlin's counsel at the June 5, 1998 hearing that Mr. Devlin could move for a preliminary injunction in this action. As early as December 1998, Mr. Devlin knew that settlement negotiations had begun. Exhibit H to Affidavit of Robert J. Devlin in Support of Cross Motion ("Devlin Aff."). Mr. Devlin further kept himself apprised of the progress of the settlement negotiations as well as the parties' settlement proposals. Exhibits C, E, F, H to Devlin Aff. Mr. Devlin

even sent a letter to the Court on April 20, 1999, stating his wish to intervene. Exhibit O to Devlin Aff.

Despite Mr. Devlin's full awareness of this ongoing litigation since October 1997, the Court's invitation to Mr. Devlin to file a preliminary injunction in June 1998, Mr. Devlin's knowledge of the parties' efforts to negotiate a settlement since December 1998, and Mr. Devlin's April 20, 1999 letter stating his desire to intervene in this action, Mr. Devlin did not file his motion to intervene until September 10, 1999, days prior to the Court's preliminary approval of the settlement and distribution of notices of the settlement to class members.

This delay demonstrates either an inexcusable lack of diligence in protecting his interests, or a deliberate strategy to delay resolution of this case so that Mr. Devlin can litigate issues in the New York Action, rather than in this Court.

At the outset of this action, Mr. Devlin sought to delay resolution of this case pending a decision in the New York Action. Exhibit B to Devlin Aff. at 5-7. The Court denied that request. *Id.* at 5-6. In seeking to be removed from the case, however, and failing to file a motion to intervene sooner, Mr. Devlin gambled that the New York Action would be resolved first.

On April 13, 1999, the United States Court of Appeals for the Second Circuit upheld the dismissal of Mr. Devlin's claims in the New York Action relating to the 1991 COLA, reversing only on an unrelated issue. Exhibits I and J to Devlin Aff. The Court of Appeals noted that "[i]t seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue. . . ." Exhibit J to Devlin Aff. at 24. A week later, on April 20, 1999, still attempting to hedge his bet, Mr. Devlin's counsel sent this Court a letter stating that he wished to intervene, but failed to take any action to do so. Exhibit O to Devlin Aff.

Notwithstanding the Second Circuit's rejection of his COLA claim, on remand Mr. Devlin moved to amend his complaint in the New York Action to revive it. That motion, filed on July 9, 1999, is still pending before Judge Keenan of the Southern District of New York.

Only when it became apparent that resolution of this action was imminent, Mr. Devlin filed a motion to intervene. Mr. Devlin now attempts to extend the life of this action, at the expense of all of the parties, by intervening and seeking a preliminary injunction. This tactic to further delay resolution of this case should not be rewarded by granting Mr. Devlin's motion to intervene.

Mr. Devlin tries to take comfort from the Second Circuit's observation that "Devlin and others in his position can be actively involved in the [Maryland] case. *See* Fed. R. Civ. P. 24(b)." Exhibit J to Devlin Aff. at 24; Cross Motion at 13. But when it spoke of intervention in April 1999, the Second Circuit carefully limited its observation to the possibility of permissive intervention under Rule 24(b), a form of intervention that is always subject to the sound discretion of the district court, as opposed to Rule 24(a), which provides for timely intervention as a matter of right. The Second Circuit did not address whether intervention would be appropriate after preliminary approval of a settlement agreement. Clearly, as envisioned by the Second Circuit, Mr. Devlin can be actively involved in this litigation—but at this juncture such involvement should be as an objector to the settlement, not as a party intervenor.

Based on these facts, Mr. Devlin's application to intervene is untimely and should be denied. *See Gould v. Alleco, Inc.*, 883 F.2d at 286.

B. Mr. Devlin's Interests Are Adequately Represented.

Mr. Devlin's request to intervene as of right also should be denied because his interests are adequately represented by

Mr. Santoro, the Retiree Class representative and Ms. Kraft, Retiree Class counsel.

Mr. Devlin challenges the adequacy of representation because Mr. Santoro's son is an officer and trustee of the TCU [1]. Ms. Kraft did not give Mr. Devlin all the information he requested during the settlement negotiations, and Ms. Kraft entered settlement negotiations without first seeking a preliminary injunction and litigating the validity of the 1997 Plan amendment that eliminated the 1991 COLA for the Retiree Class, contrary to Mr. Devlin's wishes. These allegations do not demonstrate as a matter of fact or law that Mr. Devlin's interests are not adequately represented.

"When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d at 216 (affirming denial of intervention); *see also Neugebauer v. A.S. Abell Co.*, 77 F.R.D. 712, 714 (D. Md. 1978) (same). Moreover, "[t]here is a presumption of adequate representation when the persons attempting to intervene are members of a class already involved in the litigation or are intervening only to protect the interests of class members." *Jenkins by Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) (rejecting claim of inadequate representation based upon disagreements over the details of the remedy sought).

Mr. Devlin is a member of the Retiree Subclass that Mr. Santoro represents and both Mr. Devlin and Mr. Santoro share the same ultimate objective of restoring, to the extent

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[1] For the sake of clarity, we note that Mr. Santoro's son is a trustee of the union, *not* of the Plan. Accordingly, Mr. Santoro's son has not had any fiduciary responsibility for, or actual involvement in, the conduct of this litigation, other than as a member of the class.

possible, the 1991 COLA benefits. This gives rise to a presumption that Mr. Santoro adequately represents Mr. Devlin's interests. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d at 216; *Jenkins by Jenkins v. Missouri*, 78 F.3d at 1275.

The fact that Mr. Santoro's son is a TCU officer does not rebut this presumption. To overcome the presumption of adequate representation a potential intervenor "must produce something more than speculation as to the purported inadequacy . . . ." *Moosehead Sanitary Dist. v. S.G. Philips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Mr. Devlin has not—and cannot—set forth any evidence that this familial relationship makes Mr. Santoro an inadequate representative, but relies solely upon his own conjecture. Mr. Devlin's conjecture is not a sufficient basis to demonstrate inadequate representation.

Mr. Devlin further alleges that Ms. Kraft breached her duties as class counsel by failing to respond to his repeated requests for information during the settlement negotiations. Mr. Devlin provides no support for this alleged breach of duty other than his own statements in his letters to Ms. Kraft. The same letters demonstrate, however, that Ms. Kraft responded, at least in part, to Mr. Devlin's repeated inquiries concerning the settlement and provided him with substantial information.

Moreover, even if Ms. Kraft had failed to respond to Mr. Devlin's demands for information during delicate ongoing settlement negotiations, this would not support the conclusion that her representation is inadequate. Class counsel's duty to provide information to class members during settlement negotiations is limited. Class counsel, for example, is not required to make counsel competing to represent the class privy to the settlement negotiations since "three cornered negotiations are clumsy at best, especially when one of the corners . . . adopts an obdurate negotiating position." *Mars Steel Corp v. Continental Illinois Nat'l Bank & Trust*, 834

F.2d 677, 684 (7th Cir. 1987). Thus, "[r]ather than attempt to prescribe the modalities of negotiation," this Court should "focus[] on the end result of the negotiations" to assess the adequacy of representation. *Id.*

Ms. Kraft's handling of settlement negotiations has been more than sufficient in these circumstances. Not only has Mr. Devlin repeatedly objected to any settlement of this action, at the time he demanded information from Ms. Kraft he was attempting to obtain an order in the New York Action reinstating the 1991 COLA. And much of the information Mr. Devlin sought was either confidential or irrelevant to this action. Ms. Kraft reasonably could withhold this information from Mr. Devlin because he could have used it to derail the settlement to which he was vehemently opposed or to advance his arguments in the New York Action, to the detriment of the Retiree Subclass. To protect the interests of the Retiree Subclass, Ms. Kraft acted wisely to limit discussions concerning the substance of the settlement to Mr. Santoro and to conduct the negotiations privately. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 331 (E.D. Pa. 1994).

Mr. Devlin's claim of inadequate representation is, at base, a complaint that Mr. Santoro and Ms. Kraft followed a different litigation strategy than Mr. Devlin would have chosen. "A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (motion to intervene was properly denied because "mere disagreement over litigation strategy or individual aspects of a remediation plan does not,); *see also Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) (affirming denial of intervention where city's decision not to appeal adverse decision did not constitute inadequate representation); *B.H. v. McDonald*, 49 F.3d 294, 297 (7th Cir. 1995) (existing party's refusal to

demand open court hearings did not reflect inadequate representation warranting intervention); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 218 (2d Cir. 1990) (state adequately represented its interest and its citizens in choosing not to oppose district court's order; citizens could not intervene to appeal order). Notwithstanding Mr. Devlin's disagreement, the decision to pursue settlement negotiations is a legitimate litigation strategy employed to secure the rights of the Retiree Subclass, and does not constitute inadequate representation or warrant intervention.

II. Mr. Devlin Does Not Meet the Requirements For Permissive Intervention.

An applicant may, in the court's discretion, be permitted to intervene upon timely application and after considering "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). As discussed above, Mr. Devlin's request to intervene plainly is not timely. In addition, allowing Mr. Devlin to intervene would unduly delay and prejudice the adjudication of the rights of the Trustees and defendant class. *See generally Norair Eng'g Corp. v. Washington Metro. Area Transit Auth.*, 33 F. Supp. 2d 422, 424 (D. Md. 1998) (denying motion to intervene as unduly prejudicial to the existing parties where potential intervenors raised issues not common to the existing parties that would complicate the case); *Benford v. American Broadcasting Co. Inc.*, 98 F.R.D. 42, 47 (D. Md. 1983) (denying intervention where potential intervenors would only reargue defenses already raised and delay the outcome of the case).

After months of negotiating, the parties to this action reached a settlement in principle, obtained preliminary approval of the settlement and have notified class members of the proposed settlement. Mr. Devlin's attempt to intervene now so that he may re-litigate issues concerning the 1991 COLA decided more than two years ago will delay the

resolution of this case. Delaying resolution of this case could derail the settlement entirely, and would certainly delay the benefit improvements that class members would be entitled to receive under the proposed settlement. For this reason, Mr. Devlin's request for permissive intervention should be denied.

Permissive intervention also should be denied when the potential intervenor will not "significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (citation omitted); *see also Arney v. Finney*, 967 F.2d 418, 421 (10th Cir. 1992) (permissive intervention properly denied where potential intervenor was a member of the class and his intervention would not aid the class in adjudicating its claims); *League of United Latin Amer. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989).

Mr. Devlin is certainly not in a position to assist in the development of the underlying factual issues. For all practical purposes, the factual issues in this case were fully developed, litigated, and decided in the related case of *Scardelletti v. Bobo*, No. JFM-95-52, where the Court concluded that the record developed in extensive discovery did not present any material issues of fact. The reality is that the only issues presented by the present action are pure questions of law.

Similarly, Mr. Devlin is not in a position to significantly contribute to the resolution of the legal issues presented. At the June 5, 1998 hearing, Mr. Devlin's counsel readily conceded that he was unfamiliar with and lacked knowledge concerning the principal legal issue in this case—whether the COLA amendment could be deemed void *ab initio*. Exhibit B to Devlin Aff. at 19-20. Given the representations by Mr. Devlin's counsel at the June 5, 1998 hearing, Mr. Devlin

cannot credibly claim that his intervention would assist in developing the factual issues of this case or in adjudicating the legal questions.

Most importantly, as a member of the Retiree Class, Mr. Devlin will have a full opportunity to raise all of his concerns about the settlement agreement, the negotiations, and the adequacy of the class representatives at the fairness hearing on November 12, 1999, prior to any approval of the proposed settlement. Intervention is not required to achieve that end. Because intervention is wholly unnecessary to allow Mr. Devlin to raise any factual or legal issues concerning the settlement and because of the substantial delay and likely prejudice that would otherwise result, the Trustees respectfully urge the Court to deny Mr. Devlin's motion to intervene.

CONCLUSION

For the foregoing reasons, Mr. Devlin's request to intervene and other relief sought in the Cross Motion should be denied.

DATED: September 23, 1999

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Memorandum in Opposition to Robert Devlin's Motion to Intervene and Response to Cross-Motion was sent by U.S. mail, first-class postage prepaid, this 23rd day of September 1999:

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/s/_____
Lonie Hassel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM 97-3464

R. A. SCARDELLETT, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

AFFIDAVIT OF BRIAN A. JONES
IN OPPOSITION TO THE
PROPOSED SETTLEMENT

STATE OF NEW YORK
COUNTY OF NEW YORK—ss. :

BRIAN A. JONES, being duly sworn, deposes and says:

1. I am an Enrolled Actuary, a member of a number of actuarial organizations and a practicing consulting actuary. I respectfully submit this affidavit in opposition to the proposed settlement.

2. My curriculum vitae is annexed hereto as Exhibit A.

3. This affidavit is based upon my knowledge of, and experience in, the areas of the Internal Revenue Code (the "Code"), and the Employee Retirement Income Security Act of 1974 ("ERISA") in which expertise in the valuation of pension plans is required of enrolled actuaries by the Joint Board for the Enrollment of Actuaries; in particular, §§ 401, 411 and 412. (Unless otherwise specified, all section references are to the Code).

4. The first sentence of § 411 provides in pertinent part that:

> an employee's right to his normal retirement benefit is nonforfeitable[2]. . .upon the attainment of normal retirement age. . .

There is no provision of the Code and its associated Regulations nor any other authority suggesting that an increase to a normal benefit in pay status falls into any category other than fully accrued; § 411 (b) (1) (H), for example, provides for "continuing *accrual* beyond normal retirement age" (emphasis supplied). Thus, the term "accrual" is not in any way inapplicable to enhanced benefits added after retirement. In particular, Treasury Regulation 1.411(d)-4(d), applicable to plan years commencing on or after January 1, 1994, describes "Benefits that are not section 411(d)(6) protected benefits". Cost-of-Living Adjustments ("COLAs") are not included in this list of unprotected benefits. Therefore, Mr. Devlin's COLA benefits, and those of similarly situated employees, are both fully vested and fully accrued.[3]

5. In my opinion, therefore, the COLA feature of the original benefits the purported cancellation of which would be endorsed in the proposed settlement, is simply part of each participant's accrued benefit as defined in § 411 and is

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[2] A nonforfeitable benefit is fully accrued since it is, by definition, "a percentage of the employee's accrued benefit."

[3] I understand that the view was expressed in an earlier case that the fact that a retiree received a benefit increase after his retirement so that he did not work in anticipation of that increase, somehow took the increase out of the category of "accrued benefit". There is nothing to support this view in the Code nor ERISA nor the applicable Regulations and Rulings, and I understand that that earlier case was settled without any appellate review so that this view does not constitute authority that would be applicable for any purpose including the proposed settlement.

subject to the "anti-cutback" rule of § 411 (d) (6) (A), which provides that:

> A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan other than an amendment described in section 412 (c) (8) . . .

§ 412 (c) (8) provides, in pertinent part:

> . . . No amendment described in this paragraph which reduces the accrued benefit of any participant shall take effect unless the plan administrator files a notice with the Secretary of Labor notifying him of such amendment and the Secretary of Labor [4] has approved such amendment, or within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary of Labor unless he determines that such amendment is necessary because of a substantial business hardship as described in subsection (d) (2) and that a waiver under subsection (d) (1) is unavailable or inadequate.

6. It appears that no notice of amendment nor request for such approval has ever been made by the Plan Administrator. It is, therefore, indisputable that the plan sponsor has not met the essential pre-conditions for an amendment reducing accrued benefits: a § 412 (c) (8) application and approval (or failure to act) by the Secretary of the Treasury. Therefore,

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[4] The Code still reads as above. However, as noted in Treasury Reg. § 1.412 (c) (8)-1,

> The function of the Secretary of Labor described in section 412(c) (8) was transferred to the Secretary of the Treasury as of December 31, 1978, by Reorganization Plan No. 4 of 1978, 1978-1 C.B. 480. Therefore, the notice described in section 412(c) (8) now must be filed as directed by the Secretary of the Treasury.

the Plan has not invoked the administrative procedures which are required to make such an amendment effective.

7. In my opinion, therefore, the fiduciaries of the Plan have violated their fiduciary duties [5] by attempting to by-pass the necessary approval procedure for establishing the continued qualification of the plan, plus the proposed cutback, by filing with the Secretary of the Treasury, and by proposing the settlement herein without having done so.

8. If an application under § 412 (c) (8) were made, the fact that the plan sponsor has satisfied the minimum funding requirements of the Code for at least the last seven years, as shown by the fact that the Forms 5500 show no minimum funding standard deficiency, means that no such waiver is possible. A "waiver" is, by definition, a waiver of a minimum funding standard deficiency which would otherwise trigger excise taxes and other enforcement remedies. It is normally an early sign of problems and possible business hardship. No business hardship is shown in this situation. Therefore, there is no basis for approval of a § 412 (c) (8) application.

9. The fact that the same Forms 5500 show no minimum funding standard credit demonstrates that the plan sponsor has deliberately made the absolute minimum contribution in each of those years and thus has deliberately not built up any flexibility in meeting the minimum funding standard requirements of § 412.

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[5] § 404 (a) (1) ERISA provides in pertinent part that:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of the like character and with like aims;

10. Any business hardship which may be claimed at this point is attributable to the plan sponsor's failure to provide prudent funding incorporating some margin over the legal minimum.

11. No consideration appears to have been given to other obvious funding alternatives such as, for example, increasing the yield on the assets through better management.

12. Since the original amendments added a COLA feature, benefiting primarily retirees, and eliminated employee contributions without any refunds of prior contributions, benefiting exclusively active employees, one way to more fairly allocate the burden of any proposed cutback in plan cost might be to reinstitute employee contributions or, better, to achieve essentially the same result more tax-efficiently by compensation adjustments and corresponding contributions.

13. In fact, all that has been done, is to arbitrarily cancel the accrued benefits of the most vulnerable participants with the result, in 1998, of overfunding the Plan and eliminating required contributions, as noted at the end of Note 8 (page 9) of the Plan's financial statements attached to the 1998 Form 5500 (Exhibit B annexed hereto.)

14. The proposed settlement is grossly unfair to Robert Devlin and other similarly situated participants in that it asks them to waive, in order to avoid plan termination, all triennial Cost-of-Living Adjustments (COLAs) to which they are entitled which benefits are part of the benefits guaranteed by the Pension Benefit Guaranty Corporation (PBGC); [6] this in exchange for one 7.5% COLA increase and one of 3.0%.

15. There is simply no reason for these participants who are retirees to fear the plan termination which the employer union is threatening as the only alternative to acceptance of

[6] subject to a five-year phase-in rule for increases effective within five years of any plan termination.

the proposed settlement. They would be far better off if the plan were terminated since the PBGC would recognize, as guaranteed benefits, the COLA benefits which the November 1, 1997 amendment sought to revoke.

16. In light to this, it is incomprehensible to me that counsel purportedly representing Mr. Devlin and other similarly situated participants, but is actually doing so over their objection, would consent to the proposed settlement by waiving, on their behalf, all claim to those benefits.[7]

17. It is clear that under the proposed settlement, the older, retired participants would lose substantial benefits earned by their pre-1991 service. The longer a particular retiree has been on the rolls—and thus, generally, the older that retiree is—the worse the adverse treatment becomes. This is demonstrated in the table annexed hereto as Exhibit C which illustrates the lost benefits by triennial period on the pension rolls, assuming full 10% increments, and also the corresponding loss if actual increments averaged only 8.5%.

18. In both cases, the oldest, most vulnerable retirees are the ones who are penalized most heavily, losing, at the higher

[7] Even if these participants were to be saddled with such "waivers" it is the position of PBGC that those waivers would not be recognized. This clear from such PBGC statements as Opinion 77-125, reading in part:

> As you know, this Corporation administers Title IV of the Employee Retirement Income Security Act of 1974 (the "Act") . . .
>
> The Pension Benefit Guaranty Corporation has interpreted the Act to prohibit the waiver of benefits guaranteed by Title IV of the Act *by a participant who does not own more than 10% of the employer*. To the extent that the proposed indemnification agreement is a prohibited waiver of guaranteed benefits, it may be unenforceable. (*emphasis supplied*)

There is no reason to believe that PBGC would view of the proposed settlement here any more favorably than the waivers which the employer in Opinion 77-125 was seeking to impose on his employees in order to frustrate the benefit guarantees of the Act.

durations, well over half of their entitlement. These retirees are, of course, precisely those whose basic benefit is likely to be relatively low, reflecting the wage levels at which they retired many years ago.

19. Exhibit D annexed hereto shows the trivial improvement in their situation under the proposed settlement: the position of the oldest retiree merely increases from 35 cents on the dollar to 39.

20. Exhibit E annexed hereto demonstrates the far greater improvement in the position of the younger active participants: the expected benefits of the youngest group increases to more than double the current projected amount.

21. Nevertheless, under the proposed settlement, which the actuary retained by the class representative group has estimated will entail a cost outlay of the order of $12 million over the next five years, as shown in his letter, Exhibit F annexed hereto, focuses almost entirely on benefits to active employees, in particular by doubling the future service rate from 1% to 2%, and virtually ignores the older retirees. This level of funding could equally well be used to provide COLA payments for an extended period if the interim relief requested by the retiree group were granted.

22. The Form 5500 for Plan Year 1998 shows on page 8 of the Notes that the sum of $8,486,049 represents the "Surplus represented by the carrying value of assets available for benefits over the total actuarial present value of accumulated plan benefits." By this measure, the Plan is, therefore, overfunded by this amount.

23. This $8.5 million is almost equal to the total employee contributions, with interest, made by the older participants: $7.5 million, as shown on page 7 of the Plan financial statements appended to the 1998 Form 5500.[8] Thus,

[8] Participant contributions were eliminated in January 1988.

substantially all of the employee contributions, made primarily by Mr. Devlin and similarly situated retirees during the pre-1991(?) employment, are, in effect, being applied to support future benefits, not yet earned and payable to currently active, generally much younger, employees.

24. The excess, $8.5 million, of assets over ABO can be viewed as a surplus amount, already on hand, which is now available to offset the cost of future benefit to active employees attributable: (a) to projected salary increases not yet awarded, the $5.2 million difference between PBO and ABO; and (b) to service not yet performed, the $3.3 million difference between assets and PBO.[9]

[9] Note 4. "BENEFIT PLANS" to the most recent Transport Communications International Union Financial Statements (Exhibit G annexed hereto) shows that the position of the Staff Retirement Plan was as follows, as of December 31, 1998:

1. Accumulated benefit obligation (ABO)	$55.3	million
2. Projected benefit obligation (PBO)	60.5	"
3. Fair value of Plan assets	63.8	"
4. Assets in excess of PBO [(3) - (2)]	3.3	"

This means that assets were, as noted above, more than sufficient on the stated actuarial assumptions, to finance all benefits attributable to service to date (ABO); also, to finance those benefits adjusted to reflect the effect of future salary increases that are projected for the active employees (PBO).

WHEREFORE, the proposed settlement should be rejected.

Respectfully submitted,

/s/_____
Brian A. Jones

Sworn to before me this
13th day of October 1999

/s/_____
Notary Public

ARTHUR M. WISEHART
Notary Public, State of New York
No. 02W14937059
Qualified in _____ County
Commission Expires June 13, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Oct. 14, 1999]

Re: Civil Action No. JFM 97-3464

I certainly object to the proposed Settlement in Case No. JFM-97-3464. Same being unfair unreasonable and inadequate towards retirees.

Sincerely

Charles O. Swasy
P.O. Box C
Torrance, PA 15779

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM 97-3464

R.A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

NOTICE OF OBJECTIONS
TO PROPOSED SETTLEMENT

STATE OF NEW YORK
COUNTY OF NEW YORK—ss. :

ROBERT J. DEVLIN, being duly sworn, deposes and says:

I am a member of the retiree class and a participant in the Transportation Communications International Union Staff Retirement Plan ("Retirement Plan").

I am also the President of the Retired Employees Protective Association ("REPA") of approximately 400 members, some of whom are deceased, which comprise a majority of the persons who are participants in the Retirement Plan who retired prior to the revocation of the Cost of Living portion of the retirement benefit by the plaintiffs herein on or before November 1, 1997.

On behalf of myself and said members of REPA, objection to the proposed settlement is hereby given pursuant to the Order of this Court dated September 14, 1999, and I intend to

appear and be heard regarding my objections and the objections to the proposed settlement on behalf of REPA, which include the following:

For the reasons stated in my Affidavit in Support of Cross-Motion sworn to September 9, 1999, and my Reply Affidavit in Further Support of Cross-Motion dated September 9, 1999, sworn to October 1, 1999, and the documents therein, the proposed settlement should not be considered and a preliminary injunction should be granted to preserve the benefits that retirees had received in the form of COLA adjustments because of the drastic effect which the unilateral elimination of the COLA benefit has had upon them and the irreparable injury shown therein.

Without waiving the foregoing objections, which we respectfully request be determined on a priority basis and a preliminary injunction issued, the additional objections to be the proposed settlement are set forth below.

1. The proposed settlement is objected to for the reasons given in the Affidavit of Brian Jones, an enrolled actuary, and the exhibits annexed thereto, sworn to October 13, 1999.

2. The proposed settlement is unacceptable to myself and the approximately 400 members of REPA whom I represent due to the blatant discrimination in favor of active employees and against the Retiree Subclass that it would entail.

3. Said discrimination in favor of younger active employees and against older retirees is motivated by the purpose of interfering with the attainment of rights which I and the other members of REPA have or may be entitled to under the Employee Retirement Income Security Act ("ERISA"), and is in retaliation against myself, and the members of REPA, in violation of Section 510 thereof. (29 U.S.C. § 1140.)

4. The discriminatory effect and adverse treatment the pre-1991 retirees is shown in the following table which sets forth the effect of the proposed settlement.

Age as of 11/1/97	Pension 10/30/99	Pension 11/1/97	Pension Decrease 11/1/97	% Loss	Proposed 7.50% 1/1/99	Decrease	%	Proposed 3% 1/1/02	Decrease	%
90	$2,594	$1,100	$1,494	57.6	$1,182	$1,412	54.4	$1,217	$1,140	43.9
80	1,772	1,100	672	37.9	1,182	590	33.3	1,217	555	31.3
70	1,331	1,100	231	17.3	1,182	149	11.2	1,217		8.6
60	1,000	1,100	$0	0	1,075	Increase $75	7.5	1,107	107	10.7

ASSUMES INITIAL BENEFIT OF $1,000 PER MONTH and Retirement at Age 60.

All COLA increases are calculated on the basis shown in Exhibit A annexed hereto.

5. In addition, active employees also would benefit from the doubling of accrual rate from 1% to 2% retroactive to January 1, 1995, and reduction of the retirement age to 60 for participants in the active subclass as stated under the Summary Terms of the Proposed Settlement on page 13 of the Notice of the Proposed Settlement filed in the Court on August 27, 1999.

6. The proposed settlement therefore discriminates against older retirees because the proposal seeks to replace a substantial pension reduction for the Retiree Subclass with an adjustment that is much less, as shown in the table above.

7. For those who retired after 1990 but before 1995, the proposed settlement also eliminates their third anniversary COLAs to which they are legally entitled, providing them with only 3 third anniversary COLAs. They are also deprived

of the 10% 5th year anniversary COLA which are provided to the other two classes, the pre-1991 retirees and the active employees.

8. Post 1995 and pre 1999 retiree pensions will be retroactively adjusted to include a doubled 2% accrual factor.

9. Members of the Active Subclass receive in excess of a 10.5% increase in pension benefits when the effect of the 2% accrual factor is considered.

10. The adverse treatment of the retirees as compared with the active employees is as high as 58%.

11. Such adverse treatment of retirees was unnecessary had the Plan assets not been mismanaged by switching the Plan's investments into junk securities in 1998.

12. Had the Plan continued to hold in 1998 the same equity securities it held in 1997, the assets available to the Plan would have increased substantially rather than experiencing the 30% loss that occurred in equity securities for 1998.

13. The plaintiffs herein had a fiduciary obligation to exercise due diligence in managing the investment of Plan funds and should be held accountable for their lack of prudence.

14. TCU's claim of financial inability to maintain the Plan funding is belied by statements made at the 1999 TCU Convention by the plaintiffs herein.

15. International Secretary Treasurer L.E. Bosher reported to the Delegates "Today our Union enjoys its strongest position in over 30 years. We have over $13 million in reserves with an adequate cash flow to operate the Union. In fact, in 1998 TCU's revenue exceed operating expenses by over two-million dollars."

16. The Staff Retirement Plan at the end of 1998 had a surplus of approximately $8.5 million.

17. Significant increases in the Cost of Living Index have had a devastating impact on the standard of living of the older retirees because the largest of those increases occurred after they retired, and were much higher than those in more recent periods.

18. TCU has always used the Consumer Price Index (CPI-W, December to December period) to apply Cost of Living Adjustments.

19. Between 1976 and 1998, the CPI has increased from 58.5 to 160.7, or 175%. Under these figures, a $500.00 pension, adjusted yearly, by the end of 1998, would rise to $1,374.00 just to maintain the same value.

20. In contrast, in recent periods the increase in the CPI since 1991 has been much less, from 132.2 to 160.7, or 22%.

21. Even under the very limited TCU formula, which provides for adjustments every 3 years limited to 10%, a $500 annuity would increase only to $995.00 or 99% between 1976 and 1998. This is 43% less than the dollar amount necessary to maintain the integrity of the value of the original pension.

22. Under TCU's present formula, the same $500 pension of a pre-1991 TCU retiree would amount to just one 10% adjustment, or $550. This is 60% behind the actual increase in inflation that was experienced.

23. Thomas Hewson, age 87, retired in 1974 on a Staff Pension amounting to $647. He had contributed to the pension fund for 20 years.

24. Absent the October 1997 amendment eliminating the COLA, Hewson's pension as of January 1, 1999, would have amounted to $1,331.00, which represents an increase of 95.8%.

25. The October 1997 amendment eliminating his COLA benefit cut his pension by 87.2% to $711, a reduction of $620 per month or $7,440 per year.

26. Had a regular, yearly, bona fide COLA been applied, Hewson's pension would have been $1,988 as of January 1, 1999. In real dollars, his present pension of $711 amounts to only 35% of the actual rise in the cost of living.

27. The adverse impact upon older retirees is shown in my own situation, which is typical of a number of the other older retirees.

28. I retired in 1983 on a monthly pension of $1,702, after having myself contributed to the Retirement Plan for 20 years, in amounts ranging from 3 ¼% to 6 ¼% of my salary, as an employee of the TCU.

29. In other words, during the entire period of my employment, an important condition of the Retirement Plan was that participants had to make direct contributions of a portion of their salaries. The applicable rate was 6 ¼% at the time of my retirement in 1983.

30. This requirement of contributions from active employees remained at 6 1/4% until January 1, 1988, after I had retired, when the Retirement Plan was made non-contributory for active employees.

31. When the requirement that active employees make payments to the Retirement Plan from their salaries was eliminated, the retirees such as myself received nothing additional to reflect the years in which they had been required to make payments to the Retirement Plan. However, the Cost of Living Adjustment was adopted in October 1988, based in large part upon the resources which the contributions of the retirees had added to the assets of the Retirement Plan.

32. This is shown by the fact that, during the years of my employment by the TCU, the contributions that I made to the Retirement Plan totaled $43,529.60.

33. The unilateral action by plaintiffs in this litigation eliminating my COLA benefit is contrary to the fact that I had made those contributions to the Retirement Plan, but active employees no longer were required to do so.

34. Elimination of the COLA had the effect of reducing my pension by $868 per month or $10,416 per year, a reduction of 31% from $2,740 to $1,872.

35. Further, had the COLA benefits fully reflected the effect of inflation, my pension would have been $2,778 per month as of January 1, 1999, but instead as noted above it is currently less than half that amount. In real dollars, my present pension of $1,872 per month amounts to only 67% of the actual rise in the cost of living that I have experienced from the time of my retirement in 1983.

36. However, inflationary changes in the cost of living were also reflected in the salary increases given to active employees during those intervening years. This had a direct effect in increasing the amount of their benefits at the time of retirement since the amount of the pension benefit directly reflects the amount of the salary during the most recent period of employment. However, the salaries paid to myself and others retiring before then did not reflect those such subsequent inflations.

37. The elimination of the COLA therefore has a double adverse impact upon the older retirees: first, because their salary and the related benefits are not based upon subsequent inflation, and second, because the subsequent inflationary adjustments, even though of a very limited nature, have now been taken away.

38. Age discrimination resulting from the adverse treatment of older retired officers and employees of the TCU is wholly attributable to defendant Scardelletti and his regime.

39. The proposed settlement requires the pre-1991 retirees, including myself to waive, in order to avoid plan termination, all 3d year anniversary COLAs to which we are entitled.

40. The inclusion of such a condition in the proposed settlement threatens plan termination if the proposed settlement is not accepted.

41. It is clear that under the proposed settlement, the pre-1991 retirees have the most to lose, for they are the ones who have contributed the most to the Retirement Plan.

42. The older the retiree is, the worse the adverse treatment between the retirees and the active employee becomes.

43. The oldest retirees who are also the most vulnerable, are the ones who are penalized most heavily.

44. The proposed settlement favors the younger, active employees by doubling the future service rate from 1% to 2%, and by reducing the benefits that had previously been contributed to and earned by the older retirees.

45. This level of funding could also be used to provide COLA payments for an extended period of time during which a preliminary injunctions was issued to prevent elimination of the COLA and during which the retirees could pursue their claims with regard to such without feeling financial pressure to accept a discriminatory settlement.

46. The proposed settlement is objected to because it was negotiated by a class representative and an attorney who have conflicting interests and in whom the retirees have no confidence.

47. I have received numerous communications from TCU retirees expressing their outrage, some of which are annexed hereto as Exhibits B to O.

48. The proposed settlement also is objected to upon the disclosures in the deposition of Claude Poulin taken on October 15, 1999, which will be submitted with exhibits when it is available.

49. Among other things, Mr. Poulin confirmed the opinion of Brian Jones that had the COLA benefit continued in 1997 so that the retirees would remain in "pay status" with respect thereto, it was not subject to revocation. Mr. Poulin confirmed that in 1991, before the COLA was eliminated, retirees such as myself would be considered to be in "pay status." It therefore is submitted that the elimination of the COLA was a violation of the fiduciary duties of the present Trustees and also void *ab initio*.

49. Mr. Poulin also confirmed that $7,436,947 held by the Retirement Plan as of December 31, 1998, represents the cumulative contributions plus interest that I and the other retirees had made to the Retirement Plan prior to its discontinuance January 1, 1988, as shown in Note 6 of the 1998 Form 5500 filed by the Retirement Plan with the United States Government (Exhibit P annexed hereto), would be given priority to being used for the benefits of the retirees by the Pension Benefit Guaranty Corporation ("PBGC") if the Retirement Plan were discontinued, but that we would not be as likely to receive such benefits as a result of our own contributions if the Plan is continued.

50. The fact that the retirees have paid for their benefits to the extent approximately $7.5 million whereas the active employees hired after 1997 have paid nothing for any part of their benefits makes the adverse treatment of the retirees and the preferential treatment given to the active employees under the proposed settlement discriminatory in the extreme.

51. Claude Poulin also confirmed that the investments in equity securities by the Retirement Plan in 1998 has produced a loss of 30% or $3.5 million as shown in the Form 5500. Poulin admitted that he had never even heard of any of the equity securities held in 1998 as shown in the Form 5500 whereas, in contrast, under different management the different equity securities held in 1997 as shown in the Form 5500 (Exhibit P annexed hereto), produced a return of 37.9%.

52. In addition, Mr. Poulin admitted that, had the equity securities held in 1998 produced a return consistent with the returns generally experienced on equity securities in that year, instead of a loss, the assets available to the Retirement Plan would have been $6.5 million greater than what was experienced in 1998 as stated in the Form 5500.

53. In addition, Mr. Poulin admitted that he did not know whether the fund manager who had such deplorable results in 1998 had been replaced even yet, or what the investment results for 1999 have been.

54. As a consequence, the members of REPA and I object to the proposed settlement because it is based on or motivated by investment results that are an outgrowth of imprudent investments and management of investments by the Trustees.

55. In addition, the proposed settlement therefore is objected to because it would diminish or impair the ability of the participants or the Plan to proceed against the Trustees to recover for mismanagement and other practices contrary to their fiduciary duties under the release provisions therein.

56. Objection is also made to the proposed settlement because, as shown in the deposition of Claude Poulin, I and other members of the class have been deprived of significant discovery by Mr. Hanrahan, counsel for the plaintiffs, on the ground that we were not entitled to it, and also by Barbara Kraft, Esq., who actively interfered with our discovery rights. This is shown in the Poulin deposition. In my presence Ms.

Kraft refused to answer any questions in a deposition that had been noticed for which she had been subpoenaed regarding significant aspects of the proposed settlement notwithstanding (a) the fact that she was shown to have failed and refused to provide us with substantial information to my own direct knowledge, and (b) the fact that Ms. Kraft admitted at the Poulin deposition that the handwritten notes on the attached letter of April 20, 1999, from the actuary for the Active Subclass that purports to relate to the costs of what the Active Subclass would receive under the settlement proposed by the TCU, were notes that Barbara Kraft herself had made from sources that she refused to disclose, and that she had otherwise refused to explain despite their direct relevance to the financial capacity of the Plan to provide a COLA benefit for retirees as shown in Exhibit Q annexed hereto.

57. For all of the foregoing reasons, and each of them, the terms and conditions of the Settlement Agreement are not fair, reasonable and adequate to the members of the Retiree Subclass.

WHEREFORE, the proposed settlement should be rejected.

Respectfully submitted,

/s/ _____
Robert J. Devlin

Sworn to before me this
16th day of October, 1999:

/s/ _____
Arthur M. Wisehart

Robert J. Devlin will testify as a witness on the subjects referred to in the foregoing Objections and based upon the documents referred to therein and in affidavits previously supplied by him.

Brian Jones, an expert witness, will testify on the subjects set forth in his affidavit submitted herewith, and on the basis of documents referred to therein.

James E. Leonard, C.P.A., an expert witness, will testify concerning accounting and investment issues, and that the assets available for benefits as shown in the Forms 5500 for 1997 and 1998 would have been substantially greater had they been prudently managed.

The deposition of Claude Poulin taken on October 15, 1999, will be offered in evidence with the Exhibits annexed thereto, and filed with the Court when it is available.

Joel Parker, a Trustee, will be called as a witness to testify concerning the investment performance of the assets of the Retirement Plan to date and the subjects referred to in letters to him as shown in Exhibit R annexed hereto, and as to the projected costs to the TCU and contributions contemplated under the proposed settlement.

Plaintiff Scardelletti will be called as a witness to testify concerning the proposed settlement, including the effect of the release provisions therein, and the terms of the settlement in the *Bobo* case.

Plaintiff Bosher will be called as a witness to testify concerning (a) the information in the Forms 5500 for 1997 and 1998 (annexed hereto as Exhibits S and P respectively), (b) projected costs of the proposed settlement to the TCU, (c) the present and anticipated future financial condition of the TCU, and (d) the terms of the settlement in the *Bobo* case.

Settlement to the TCU, and its ability to pay them, and (d) the terms of the settlement in the *Bobo* case.

Anthony Santoro, Sr., will be called as a witness concerning his knowledge of the proposed settlement and about conflicting interests that he and his counsel Barbara Kraft may have as representatives of the Retiree Subclass.

Barbara Kraft will be called as a witness concerning her knowledge of the costs and terms of the proposed settlement, including the release provisions thereof, her services in connection therewith, and in the *Bobo* litigation, and conflicting interests that may require her disqualification in acting as an attorney for the Retiree Subclass.

Dated: October 16, 1999

/s/_____
Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 W. 44th Street, Suite 412
New York, New York 10036
(212) 730-0044

/s/_____
Travis Mastroddi (25164)

KAHN, SMITH, & COLLINS
201 North Charles Street, 10th Floor
Baltimore, Maryland 21201
(410) 244-1010

Attorneys for Robert J. Devlin and the Retired Employees Protective Association

October 7, 1999

Clerk of the U. S. District Court
For the District of Maryland
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

RE: *Scardelletti vs. Santoro*
Civil Action No. JFM-97-3464

Dear Mr. Monge:

I am a "Retiree Subclass" member who retired prior to January 1, 1991, and whose plan benefits were reduced as a result of the October, 1997, amendment eliminating the 1991 COLA. The reduction amounted to $427.65 per month or a total of $9,835.95 through September, 1999.

As to the proposed 7.5 percent COLA effective January 1, 1999, I find that it would not come close to covering the loss I will have suffered as a result of the elimination of the 1991 COLA.

It is also my understanding that during the 1999 Las Vegas Convention, statements were made by at least two International Officers and the Finance Chairman as follows: ". . . the state of our Union is strong financially", "TCU's financial condition is excellent", ". . . Today our Union enjoys its strongest position in over 30 years . . ." with $13 million in reserve", ". . . TCU's 1998 revenue exceeded operating expenses by over two million dollars!" Therefore, and in view of the facts outlined above, I must object to the proposed settlement.

Very truly yours,

/s/_____
James L. Bailey
260 Eagle Dr.
Panama City Bch, FL 32407-2820

cc: Barbara Kraft
Robert Devlin

Carrollton, IL 62016
October 6, 1999

Clerk of the U.S. District Court
For the District of Maryland
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201

RE: Scardelletti & Santoro
Civil Action No. JFM-97-3463

Sir:

Upon receipt of an offer from Scardelletti to settle this case pending, I object to this offer and refuse it. He took from us in one lump sum so I want my part of the settlement in one lump sum.

I do not trust this man and have no respect for him. After the past period of time and the happenings I could never trust him. It would seem to me this is written in his favor and not in favor of the retires many of whom have been badly hurt.

Sincerely

/s/ _____
Desmond Frazer
321206470
515 Maple Street
Carrollton, IL 62016

R.A. SCARDELLETTI, *et al.*

Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*

Defendants.

Civil Action
No. JFM-97-3464

Frank L. Monge
Clerk of the Court
United States District Court for the
District of Maryland

I object to the proposed settlement, in the above named class action suit as being unfair, unreasonable, and inadequate. In all fairness to the dedicated retirees, it should not be approved by the court.

/s/_____
Robert A. Parrish
4593 Dogwood Court
Oceanside, CA 92046
(760) (619) 758-1281

Dated: October 4, 1999

Counsel for Plaintiffs:

William F. Hanrahan
Groom Law Group, Chtd.
1701 Pennsylvania Ave., N.W
Washington, D.C. 20006

Counsel for the Active Subclass:

Kenneth Johnson
Tuggle, Duggins, & Meschan, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, North Carolina 27402

Counsel for the Retiree Subclass:

Barbara Kraft
Beins, Axelrod & Kraft, P.C.
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036

Cicero T. Lucas, Jr.
30 Cordova St.
St. Augustine, Florida 32084

October 6, 1999

U.S. District Judge J. F. Motz
101 West Lombard Street
Baltimore, Md. 21201

Re: Case No. JFM 97-3464

Dear Judge Motz:

This letter will serve as my formal opposition to and rejection of the proposed settlement in case No. JFM 97-3464.

This is my brief, but firm, expression of dissatisfaction with the obvious sell-out which this case represents.

Yours very truly,

/s/_____

Cicero T. Lucas, Jr.

cc: R.J. Devlin
342 Fifth Ave.
River Edge, N.J. 07661-1113

cc: Barbara Kraft, Esq.
1717 Massachusetts Ave., N.W.
Suite 704
Washington, D.C. 20036

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*
Defendants.

_____

Civil Action No. JFM-97-3464

_____

Frank L. Monge
Clerk of the Court
United States District Court for the
District of Maryland

Referring to the matters described in the above Notice, I find them unethical, despicable, and disgustingly objectionable.

/s/ _____
Miriam E. Parrish
4593 Dogwood Court
Oceanside, CA 92046
(760) (619) 758-1281

Dated: October 4, 1999

Counsel for Plaintiffs:

William F. Hanrahan
Groom Law Group, Chtd.
1701 Pennsylvania Ave. N.W.
Washington, D.C. 20006

Counsel for the Active Subclass:

Kenneth Johnson
Tuggle, Duggins, & Meschan, P.A.
228 West Market Street
P.O. Box 2888
Greensboro, North Carolina 27402

Counsel for the Retiree Subclass:

Barbara Kraft
Beins, Axelrod & Kraft, P.C.
1717 Massachusetts Ave. N.W.
Washington, D.C. 20036

9415 N. E. 32nd Ave.,
Vancouver, Wa. 98665
September 30, 1999

Clerk, United States District Court
For the District of Maryland
101 W. Lombard Street
Baltimore, Maryland, 21201

Re: *Scardelli v. Santoro*
Civil Action No.
JFM-97-3464

Dear Sir:

I am a participant in the Staff Retirement Plan of the Transportation Communications International Union, having retired in August, 1980.

Please consider this letter my objection to the settlement proposed in the above cited case.

Yours truly,

/s/ _____
James H. Groskopf
Dist. 1262

Copy to:

William F. Hanaran
Barbara Kraft
Kenneth Johnson

September 23, 1999

Honorable J. F. Motz
U.S. District Judge
101 W. Lombard Street
Baltimore, MD 21201

Dear Judge:

This has reference to Case #JFM 97-3464 and the proposed settlement sent to me by TCU.

The proposed settlement is an outrage that continues to deny me the means to live a normal life. It appears that all the lawyers and others involved have conflicts that prohibit a just settlement.

I am a plaintiff in a similar lawsuit in New York and this settlement if accepted would deny my rights to a fair trial on the issues.

I object to the proposed settlement.

Yours truly,

/s/ _____
Andrew M. Hagan

Cc: R. J. Devlin-REPA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C.A. No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

DECLARATION OF DANIEL C. RUDIN

I, Daniel C. Rudin, make the following statements in support of the proposed settlement of this action ("Settlement").

1. I am a Principal in the firm of William M. Mercer, Inc. ("Mercer"), an actuarial consulting firm, and a Fellow of the Society of Actuaries. I am the Enrolled Actuary for the Transportation Communications International Union Staff Retirement Plan ("Plan"). A copy of my *curriculum vitae* is attached hereto as Exhibit R-1.

2. As part of my duties as Enrolled Actuary to the Plan, I supervise the preparation of and certify the results of annual actuarial valuations for the Plan. These valuations are designed, among other things, to determine the annual funding requirements of the Plan for purposes of the minimum funding requirements established under the Employee Retirement Income Security Act of 1974 ("ERISA"). I also supervise the preparation of Schedule B to Form 5500, a report filed annually with the Internal Revenue Service and the U.S. Department of Labor. As Enrolled Actuary to the Plan, I certify in the Schedule B that the Plan has satisfied ERISA's minimum funding standards for the

year to which the Form 5500 pertains. As a result of these duties, I am familiar with the terms of the Plan, its funding status, and the information used to determine the value of benefits accrued under the Plan.

3. In late 1992, I was retained to be the Plan's Enrolled Actuary, effective on January 1, 1993, replacing Robert E. Nemann of Nemann & Associates, who had served as the Plan's enrolled actuary for many years. As a routine function of the transition from one actuarial consulting firm to another, we obtained data for the Plan as of January 1, 1992, and attempted to reproduce the valuation results generated by Mr. Nemann with respect to the 1992 plan year. In addition, we reviewed the actuarial valuation and Schedule B for the 1990 and 1991 plan years. Our analysis of Mr. Nemann's 1991 and 1992 valuations revealed that he had committed material errors in the valuations, principally relating to the cost of an amendment to the Plan that became effective January 1, 1991 ("1991 COLA Amendment"), which provided for both retroactive and automatic future Cost of Living Adjustments ("COLAs") for all participants of the Plan. (The circumstances surrounding the adoption of the 1991 COLA Amendment are described in this Court's opinion in *Scardelletti v. Bobo*, 1997 U.S. Dist. LEXIS 14498 (D. Md., September 8, 1997.)

4. The effect of the errors in the 1991 and 1992 valuations was to understate the total value of benefits under the Plan, and in turn to understate the amount of the minimum annual contributions required by ERISA. The Plan's sponsor, the Transportation Communications International Union ("TCU") had traditionally made contributions to the Plan equal to 17.5% of payroll, an amount that, until the adoption of the 1991 COLA Amendment, was more than sufficient to satisfy ERISA's minimum funding standards. However, we advised the Trustees of the Plan and the TCU that if the existing credit balance in the Plan's funding standard account of $7.7 million

were disregarded, the required minimum contribution for 1993 would be $4.1 million, an amount equal to 31.5% of payroll. We further advised that if the credit balance were applied to satisfy minimum funding obligations, the credit balance would be exhausted in two years.

5. The officers of TCU concluded that the organization could not sustain contributions at such a high level over a long period. Various options were considered to deal with the problem, including a termination of the Plan or a freezing of all accruals under the Plan. TCU selected a third option, and amended the Plan, effective May 15, 1993, to freeze the COLA as it pertains to the future service accrual for active employees. This amendment reduced the present value of projected benefits by $6.2 million, and extended the period under which the 17.5% contribution level would satisfy minimum funding standards by two years, provided that the existing credit balance in the Plan's funding standard account was utilized to offset a portion of the required minimum contributions. This credit balance existed because TCU had made contributions in prior years which were in excess of the required minimum contributions. The 1993 amendment was a remedial effort to address the anticipated funding problems of the TCU Plan. It clearly did not fully restore the Plan to a financially viable status.

6. A valuation as of January 1, 1995 confirmed that further action would be required to restore the Plan to a financially viable status. By this point, the credit balance had been reduced to $723,674, and the required minimum contribution for 1995, after the application of this credit balance, was determined to be $4.1 million, which was equal to 34% of TCU's payroll. This meant that TCU would be required to contribute $2 million more than the $2.1 million that would have been the expected contribution at the 17.5% of payroll contribution rate.

7. To address this situation, on September 14, 1995, TCU's Executive Council adopted a plan amendment which (1) reduced the normal retirement pension to 1% of final average compensation for each year of credited service after January 1, 1995, and (2) increased the normal retirement age to age 62. Prior to the amendment, the normal retirement pension was equal to 2% of final average compensation for each year of credited service, and the normal retirement age was age 60. By reducing the future pensions for active employees in this fashion, the required minimum contribution for 1995, after the application of the credit balance, was reduced to $3.0 million. This amount was equal to 27% of TCU's payroll for the year.

8. For the 1996 plan year, TCU contributed $2,664,391 to the Plan, which was sufficient to satisfy the minimum funding requirement for that year. This amount was equal to 23% of TCU's payroll for the year.

9. For the 1997 plan year, TCU contributed $2,985,538 to the Plan, which was sufficient to satisfy the minimum funding requirement for that year. This amount was equal to 27% of TCU's payroll for the year.

10. During the period from January 1, 1991 through October 31, 1997, the Plan paid of total of approximately $6.5 million in additional benefits attributable to the 1991 COLA Amendment to members of the Retiree Subclass.

11. On September 8, 1997, this Court issued its ruling in *Scardelletti v. Bobo*, in which the Court determined that the 1991 COLA Amendment did not create an accrued benefit for Plan participants who retired or terminated service before the Amendment became effective on January 1, 1991. Thereafter, TCU's Executive Council adopted an amendment, effective November 1, 1997 (the "1997 Amendment"), eliminating the 1991 COLA for participants who retired or terminated service before January 1, 1991. The amendment

also restored, for this group only, a one-time 10% COLA after five years of retirement, which had been superseded by the 1991 COLA Amendment. The effect of the 1997 Amendment was to reduce benefits for pre-1991 retirees to the levels in effect on their dates of retirement, plus 10%. Similarly, vested participants who terminated service with the TCU prior to 1991 would receive pensions equal to the pension earned under the Plan's benefit formula in effect at the time they terminated service, plus a 10% increase five years after they begin to receive benefits.

12. The 1997 Amendment materially changed the funding status of the Plan. One measure of the Plan's funded status is to examine the "unfunded frozen initial liability" at the beginning of each Plan year. The actuarial cost method used to determine the Plan's liabilities is known as the "Entry Age Normal, Frozen Initial Liability Method." At the beginning of the 1997 plan year, the Plan's unfunded frozen initial liability was $14,485,130. The 1997 Amendment reduced this amount by $13,526,574. This reduction, together with the contributions made during 1997, completely eliminated the unfunded frozen initial liability. For purposes of ERISA's minimum funding requirements, the elimination of COLA liabilities for pre-1991 retirees and terminated vested participants meant that the minimum required contribution for 1998 was zero. Nevertheless, TCU contributed $2,017,748 in 1998. This amount was equal to 17.5% of TCU's payroll for the year.

13. Another way to view the funded status of the Plan as of January 1, 1999, is to estimate the cost of terminating the Plan through what is known as a "standard termination." A standard termination involves settling all of a plan's benefit obligations by purchasing annuities from an insurance company, following procedures prescribed by the Pension Benefit Guaranty Corporation ("PBGC"), a U.S. Government agency which oversees the termination of defined benefit

plans and which insures such plans in the event that a plan terminates with insufficient assets to satisfy its liabilities. In May 1999, Mercer actuaries, acting under my supervision, made an estimate of the Plan's liabilities on a standard termination basis under two different scenarios. Under the first scenario, we assumed that the Plan liabilities were only those liabilities under the benefit structure currently in place, that is, with the 1991 COLA eliminated for retirees and terminated vested participants. The second scenario assumed that the Plan was restored to the benefits structure in effect immediately before the 1997 Amendment, that is, that the 1991 COLA would be restored for pre-1991 retirees and terminated vested participants. The results of these estimates are set forth in the table below.

Pre November 1, 1997 Amendment ($Million)	Accrued Benefit	Future COLA	TOTAL
Actives	$ 14.6	$ 0.6	$ 15.2
Post 1990 Terminations	24.7	7.1	31.8
Pre 1991 Terminations	38.7-	12.3	51.0
Total	$ 78.0	$ 20.0	$ 98.0

These liabilities were estimated using the interest and mortality assumptions used in May 1999 by insurance companies to value annuities (5.50%, GA83). The Plan's assets as of January 1, 1999 were $62.8 million dollars. Therefore, to terminate the Plan with it current benefit structure in a standard termination would require TCU to contribute approximately an additional $23.3 million to the Plan to enable it to purchase the kind of commercially-available annuities required by the PBGC. (In a standard termination, PBGC would require the Plan to include in the annuities the value of future COLA increases for the Active Subclass and for Retiree Subclass members who retired or terminated service from 1991 through 1998. Thus, the $78.0 million figure for liabilities would increase by an additional $8.1 million.) If the 1991 COLA were restored for the pre-1991 retirees and terminated vested participants, the additional contribution required to effectuate a standard termination would be approximately $35.2 million.

14. Another method of terminating a defined benefit pension plan is to seek a distress termination from the PBGC. In general, in a distress termination, the employer sponsoring the plan must show that it is undergoing a liquidation or reorganization in bankruptcy and satisfy certain other criteria, or show that continued funding of the plan will render the plan sponsor insolvent. If the PBGC determines that a distress termination is appropriate, it will terminate the plan and assume control of its affairs, and pay certain guaranteed benefits to plan participants. A distress termination also creates a claim by the PBGC against the plan sponsor for the value of benefits that PBGC is responsible for paying to participants in excess of the plan's assets at the time of termination. We have not made a precise estimate of TCU's potential liability to PBGC under the scenario of a restoration of the 1991 COLA benefit for pre-1991 retirees and terminated vested participants followed by a distress termination, but a rough estimate of that liability is that it would be greater than $15 million. The principal reason that this roughly estimated claim is not larger is that PBGC would not treat future COLA increases called for under the 1991 COLA Amendment as benefits that the PBGC would pay.

15. In late 1998, the Trustees of the Plan asked me to conduct an analysis of a variety of settlement proposals that might be made to the Class representatives in this action to allow the Trustees to determine whether the Plan's funding status would make an effort to settle this litigation feasible. After receiving this analysis, the Trustees, through counsel, opened settlement discussions with the Class representatives and their counsel. As those discussions progressed, I was

asked to have prepared cost estimates of various proposals made by the Class representatives and by the Trustees. Settlement discussions continued into 1999, and I directed Mercer personnel to prepare additional cost estimates of various proposals made by the parties.

16. By letter March 31, 1999, I provided the Trustees with a document that set forth the estimated funded status of the Plan as of January 1, 1999, and cost estimates of eight benefits scenarios. These scenarios included the current status of the Plan, the status if the case were litigated to a conclusion favorable to the Retiree Subclass, and scenarios showing the Plan's status under various settlement proposals advanced by the Trustees or by the Class representatives. A copy of this document is attached hereto as Exhibit R-2.

17. The cost estimates contained in Exhibit R-2 were performed using three different measures of the liabilities of a pension plan. The Present Value of Benefits ("PVB") is the total value of benefits that are expected to be paid by the Plan for existing participants, and includes a projection of all service and salary credits to expected termination, or retirement. The difference between the Present Value of Benefits and the current value of the Plan's assets is the present value of future contributions that the plan sponsor will need to make over time. In contrast, the Present Value of Accumulated Benefits ("PVAB") is the value of all benefits that have been earned to date, based on service credits and salary earned as of the determination date. This would be the value of benefits payable if all employees terminated their employment on that date. Both the PVB and the PVAB are calculated using the assumptions adopted by the actuary for use with the plan's funding method. The PVA and the PVAB estimates in Exhibit R-2 were calculated using assumptions as set forth in the Form 5500 for the 1998 Plan year.

18. The third measurement of the liabilities of a pension plan is referred to in Exhibit R-2 as "RPA '94 Current

Liability" or "RPA94 CL." This is a reference to the Retirement Protection Act of 1994, which modified ERISA's existing minimum funding requirements by establishing a standard minimum funding requirement that all plans must satisfy. In general, RPA '94 requires the plan's enrolled actuary to calculate the plan's liabilities using certain mandated interest and mortality assumptions prescribed by the Internal Revenue Service for all plans. Once the plan's liabilities are calculated using these assumptions, the actuary determines the plan's "funded ratio," that is, the ratio of the plan's liabilities to its assets, determined as of the beginning of the plan year. If the plan's funded ratio falls below certain statutory benchmarks, then additional funding requirements are triggered, and the plan's sponsor is required to make larger contributions in order to fund the plan's liabilities at a faster rate than would be required under the general minimum funding requirements. If a plan's RPA '94 funded ratio falls below 90% in the current plan year and for two of the three years prior to the current plan year, the additional funding requirements are triggered, and the level of required contributions will be substantially higher than under normal minimum funding rules. Consequently, for purposes of the settlement discussions in this litigation, the most important measure of the Plan's liabilities was the RPA '94 Current Liability, because that liability determines the rate at which the Plan would have to be funded if the settlement, or the litigation, results in higher levels of benefits becoming payable under the Plan.

19. The effect of the RPA '94 Current Liability can be illustrated by comparing the RPA '94 funded ratio of the Plan as it currently exists, that is, with the reduction of liabilities caused by the 1997 Amendment, with the RPA '94 funded ratio of the Plan if the 1997 Amendment were rescinded and the 1991 COLA Amendment were restored for pre-1991 retirees and terminated vested participants, as might happen if this case were litigated to a conclusion and the Retiree

Subclass prevailed. Under the current Plan, the RPA '94 funded ratio is 92.1%, that is, the assets of the Plan on January 1, 1999 of $62.8 million are equal to 92.1% of the Plan's liabilities of 68.2 million. If the Plan's existing credit balance in the funding standard account is used to offset a portion of the required minimum contributions the projected minimum contributions from 1999 through 2002 are set forth in the table below (in millions). In contrast, if the 1991 COLA Amendment were restored for the pre-1991 retirees and terminated vested participants, the RPA '94 funded ratio of the Plan would be 72.9%, reflecting total liabilities of the Plan of $86.2 million. The projected minimum cont5ributions under this scenario (again using the credit balance to offset a portion of the contributions) are as set forth in the table below (in millions). Finally, for purposes of comparison, the projected minimum contributions that would be required under the Settlement (again using the credit balance to offset a portion of the contributions) are as set forth in the table below (in millions).

	Current Plan	Settlement Plan	1991 COLA Amendment Restored
1999	$0.0	$0.0	$5.7
2000	$0.0	$0.3	$7.7
2001	$0.0	$5.8	$6.8
2002	$4.6	$5.2	$5.7
TOTALS	$4.6	$11.3	$25.9

20. During the course of negotiations, the trustees and the Class representatives made a series of proposals that called for benefit changes for each of the various groups within the Subclasses. The Trustees rejected the proposals advanced by the Subclass representatives because those proposals, in combination, lowered the Plan's RPA '94 funded ratio to well

below 90% in 1999, and would, if adopted, have triggered substantial increases in the projected minimum contribution obligations over the next four years. Similarly, the Class representatives rejected proposals advanced by the Trustees that would have put the Plan's 1999 RPA's funded ratio at 91% or better and which would have postponed until 2003 or 2004 the imposition of RPA '94 required additional contributions. Ultimately, the parties reached agreement on a set of benefit changes that will put the Plan's RPA '94 funded ratio at slightly below 91% as of January 1, 1999, and that are projected to require additional contributions under RPA '94 beginning in 2001, assuming the existing credit balance is used to offset minimum contributions until it is exhausted.

21. The cost estimates and contribution projections set out in Exhibit R-2 are based on various assumptions about interest rates, changes in assets, and mortality. If the settlement is approved, and the Plan's benefit structure is changed as provided in the Settlement Agreement and Release, the Plan's actual experience may be different from what is assumed in the cost estimates. There is a risk, for example, that if the Plan's rate of investment return varies from the assumed long-term 8% rate of return, as can be expected when viewed over a relatively short time frame such as four years, the Plan's RPA '94 funded ratio may be different from year to year than assumed in the projections. This, in turn, could trigger additional contribution requirements earlier than anticipated.

22. The Settlement Agreement and Release provides for different benefit modifications depending on each Plan participant's date of retirement or termination of service. Members of the Retiree Subclass who retired before January 1, 1991, will receive a 7.5% increase in their current benefit amounts, effective January 1, 1999. Because the settlement will not become effective until it receives final approval from the Court, and all appeals have been

exhausted, the benefit increases that will become payable for the period from January 1, 1999 through the date of final approval will be paid in a lump sum after the effective date. Thereafter, a second benefit increase of 3.0% in their then-current benefits amounts will go into effect on January 1, 2002.

23. The effect of these benefit increases for pre-1991 retirees can be illustrated by examining the impact on Robert J. Devlin, who retired in 1983 at age 58, and who has expressed various objections to the settlement. When he retired, at a time when the Plan did not provide for any kind of post-retirement COLA, Mr. Devlin began receiving a monthly pension of $1,702.58. That pension was increased, beginning on January 1, 1989, by 10%, in accordance with the one-time 10% COLA after five years of retirement provision added to the Plan in 1988. Thereafter, beginning on January 1, 1991, his pension was increased in accordance with the 1991 COLA Amendment. As of October 1, 1997, he was receiving a monthly pension of $2,449.69. Effective on November 1, 1997, in accordance with the 1997 Amendment, his monthly pension was reduced to $1,872.84. If the settlement is approved, his monthly pension will increase by 7.5% to $2,013.30, effective on January 1, 1999. Assuming that the effective date of the settlement is December 31, 1999, he would be entitled to a lump sum payment of $1,685.52. Finally, his monthly pension would increase an additional 3% on January 1, 2002, to $2,073.70. This amount represents a 22% increase over his original benefit amount of $1,702.58, payable at the time he retired. This total percentage increase represents the combined effect of the 1997 Amendment's restoration of the 10% after five years of retirement COLA and the increases called for in the Settlement Agreement and Release.

24. Thomas Hewson is another pre-1991 Retiree Subclass member who has objected to the Settlement. Mr. Hewson

was born in 1912, and retired from TCU in 1974. At the time he retired, his monthly pension was $646.74. On January 1, 1989, his monthly pension was increased to $711.41. On January 1, 1991, his monthly pension was increased in accordance with the 1991 COLA Amendment. As of October 1, 1997, he was receiving a monthly pension of $1,238.54. Effective on November 1, 1997, in accordance with the 1997 Amendment, his monthly pension was reduced to $711.41. If the settlement is approved, his monthly pension will increase by 7.5% to $764.77, effective on January 1, 1999. Assuming that the effective date of the settlement is December 31, 1999, he would be entitled to a lump sum payment of $640.32. Finally, his monthly pension would increase an additional 3% on January 1, 2002, to $787.71. This amount represents a 22% increase over his original benefit amount of $646.74, payable at he time he retired. This total percentage increase represents the combined effect of the 1997 Amendment's restoration of the 10% after five years of retirement COLA and the increases called for in the Settlement.

25. Under the Settlement, Retiree Subclass members who terminated service with TCU before January 1, 1991, and who have vested benefits payable at some time in the future will receive a 5% increase in their normal retirement pension on the date their benefits commence, and will receive a second 5% increase on the first anniversary of the date their benefits commence. For example, one Retiree Subclass member, referred to here as RDP, worked for TCU from 1976 until 1984. He is currently age 54. His monthly benefit payable at retirement is $302.53. However, under the Settlement, that amount will increase by 5% on the date he elects to receive a pension to $317.66, and will increase by another 5% to $333.54 one year later. The total increase in his monthly benefit is equal to 10.25% of his monthly benefit without the settlement. As specified in the 1997 Amendment, he will receive a final 10% increase to $366.89 on the fifth anniversary of his benefit commencement date. The total

increase in his monthly benefit after five years of retirement is equal to 21% of his normal retirement benefit.

26. Under the Settlement, Retiree Subclass members who retired or terminated service after January 1, 1991 and before January 1, 1999, will receive COLAs on the third, six and ninth anniversaries of their benefit commencement dates. The amount of each increase will be equal to the increase in the Consumer Price Index in the three calendar years preceding the anniversary date, but not more than 10%. For example, one Retiree Subclass Member, referred to here as BH, retired and began receiving a monthly pension of $3,208.20 on July 1, 1991. She received an increase in her monthly pension amount of 8.1% on July 1, 1995, and a 7.3% increase on July 1, 1998. At present, her monthly pension is $3,721.23. Under the Settlement, she will receive a third and final increase of not more than 10% on July 1, 2001. Assuming she receives the full 10% increase, her final monthly pension amount would be $4,093.36. If this action were litigated to a conclusion unfavorable to the Retiree Subclass, her monthly pension would revert to $3,208.20

27. Members of the Active Subclass are those who were employed by TCU on or after January 1, 1999. In 1995, their future benefit accrual rate was reduced from 2% of final average compensation for each year of service under the Plan to 1%. In addition, their normal retirement age was increased from age 60 to age 62. Under the Settlement, their benefit accrual rate will be retroactively restored to 2%. However, the Settlement does not restore the normal retirement age to age 60. Thus, under the Settlement, should a member of the Active Subclass wish to retire at age 60, he would be treated under the Plan as electing an early retirement pension. Early retirement pensions under the Plan are reduced by ½% per month for each month the benefit commencement date precedes normal retirement age.

28. The effect of the Settlement on the Active Subclass can be illustrated by considering the circumstances of a member of the Active Subclass, referred to here as RA, who began earning credited service under the Plan in 1988 at age 41. His annual salary in 1998 was $45,619, and for purposes of this illustration, it will be assumed that that will be his final average salary when he elects early retirement at age 60, with 19 years of credited service. Under the Plan formula now in effect, his monthly early retirement pension at age 60 would be $970.16. Under the Settlement, his monthly early retirement pension would be $1,271.25. However, under the Plan terms in effect immediately prior to the adoption of the 1991 COLA Amendment, his normal retirement pension payable at age 60 would have been $1,444.60.

29. The Settlement contains other provisions for the benefit of the Active Subclass. The Settlement prohibits TCU from amending the Plan to provide any other benefit increases, except increases required by law, until (1) the Plan is amended to change the normal retirement date under the Plan to age 60 for all members of the Active Subclass, with a retroactive payment for any member of the Active Subclass who, prior to the amendment, retired before attaining normal age; and (2) the Plan is amended to provide a COLA for all members of the Active Subclass equal to 10% of the member's retirement benefit beginning on the fifth anniversary of the member's retirement. These potential benefit improvements represent elements of the Plan's benefit formula in effect immediately before the adoption of the 1991 COLA Amendment that could not be restored under the Plan at this time because the cost of these improvements would push the Plan's RPA '94 funded ratio for 1999 below the 90% threshold. The prohibition on other benefit improvements under the Plan is designed to encourage TCU to restore these elements of the pre-1991 benefit formula for the Active Class at such time as the Plan is able to sustain these

additional benefits. However, the provision does not bind TCU to make these benefit improvements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November __2nd__, 1999.

/s/_____
Daniel C. Rudin, F.S.A.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES MAGISTRATE JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-4560
(410)962-3630 FAX

August 6, 1999

RE: *Scardelletti v. Santoro* JFM-97-3464

MEMORANDUM FOR COUNSEL

Dear Mr. Hanrahan:

Thank you for faxing me the status letter outlining the settlement progress. I have forwarded it to Chief Judge Motz, and I expect to be back to you very shortly to advise you to forward copies of the agreements and proposed class notice to me to submit to Judge Motz for preliminary approval and the scheduling of a fairness hearing.

As I told Judge Motz, it was a privilege for me to see parties with real differences on significant issues, represented by excellent counsel, sit down at the table and set emotion aside, and craft a fair agreement, albeit one which required them to make personal sacrifices. You are all to be commended.

/s/_____
Paul W. Grimm
United States Magistrate Judge

cc: Chambers settlement file

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

C.A. No. JFM-97-3464

R. A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

DECLARATION OF BARBARA KRAFT

1. I am the attorney for the Retiree Subclass in this litigation. The Retiree Subclass consists of approximately 486 employees who retired or terminated their service under the Transportation Communications International Union (TCU) Staff Retirement Plan ("the Plan") prior to January 1, 1999 and their beneficiaries.

Factual Background and Commencement of Representation

2. In early July 1998, TCU General Counsel Mitchell Kraus and Plan Attorney John A. Edmond informed me that the Plan's Trustees had sued its former Trustees in this Court for breach of fiduciary duty, arising out of an amendment to the Plan providing for a cost-of-living adjustment (COLA) effective January 1, 1991 and recommended by the former Trustees to the TCU Executive Board in late 1990. Mr. Kraus and Mr. Edmond also informed me that, as a result of this Court's decision in September 1997 in that lawsuit that the COLA was not an accrued benefit as to pre-1991 retirees, the current Plan Trustees had filed another lawsuit seeking a declaratory judgment that the COLA amendment was null and void because it was adopted as a result of the former

Trustees' breach of fiduciary duty. Mr. Kraus and Mr. Edmond advised that the current Trustees had named as defendants in this second lawsuit a class of all retired and active participants in the Plan, and designated Robert J. Devlin, a TCU retiree who opposed elimination of the COLA, as class representative. They further informed me that Mr. Devlin had declined to serve as class representative, and that another TCU retiree, Thomas Diehl, was willing to serve as class representative.

3. Mr. Kraus and Mr. Edmond asked me if I was willing to undertake representation of the retired participant group in this class action lawsuit. Both Mr. Kraus and Mr. Edmond were unequivocal in stating that TCU would expect my representation to be zealous and uncompromised. They also stated that the current Trustees planned to try to negotiate a settlement of this second lawsuit. I told them I was willing to consider representing the retirees. When I inquired as to the terms of my firm's compensation for this representation, Mr. Kraus informed me that the TCU would pay my legal fees and expenses. After considering Mr. Kraus' and Mr. Edmond's proposal and researching whether representing the retirees while being compensated by TCU was consistent with my ethical responsibilities, I agreed to the representation.

4. I later met with Mr. Diehl and discussed at length with him his role as class representative in this lawsuit and my role as attorney. He and I spoke again within a few days of our first meeting. Several days later, Mr. Diehl called to advise me that he had decided against serving as class representative in this case. Shortly thereafter, Mr. Kraus introduced me to Anthony P. Santoro, Sr., a TCU retiree who also opposed elimination of the COLA. After discussing our respective roles, Mr. Santoro and I agreed that he would serve as class representative and I would act as the attorney for the retirees.

* * *

Settlement Negotiations

8. In late October 1998, I met with Mr. Kraus and Mr. Hanrahan to discuss a possible settlement of this case. At around the same time, I spoke with actuary Claude Poulin, and secured his agreement to assist me and Mr. Santoro in evaluating and making settlement proposals in the case. Mr. Poulin is a widely respected and experienced actuary who has considerable experience with unions and union retirement plans, and has been actively involved on behalf of participants and unions in challenging benefit cutbacks, including employer conversions of traditional defined benefit plans to cash balance plans. At the late October meeting, plaintiffs' counsel proposed a settlement consisting of a one-time 5% COLA for pre-1991 retirees and terminated vested employees, and two (2) third-anniversary COLAs for post-1991 retirees and terminated vesteds. The cost of the proposal, along with three other benefit outcomes—maintaining then-current benefit formulas, eliminating the COLA for post-1990 retirees in the event plaintiffs prevailed in this litigation, and adding a 5% COLA for pre-1991 retirees only—was presented in an October 2, 1998 report of a benefits study prepared by the Plan's actuarial consultant, William M. Mercer. I shared these and copies of subsequent Mercer cost estimates with Mr. Poulin and Retiree Subclass member Robert J. Devlin.

9. In December 1998, I notified Mr. Hanrahan that I had rejected TCU's initial settlement proposal. At the same time, I proposed a counteroffer which provided for much more generous increases for both pre-1991 and post-1990 retirees and terminated vested employees. In late January or early February 1999, I called Mr. Hanrahan to inquire about the plaintiffs' response to my December 1998 counteroffer. Shortly thereafter, Mr. Hanrahan advised that plaintiffs had

rejected my counteroffer. Later in February, 1999, the parties' counsel and their actuaries met at Mr. Hanrahan's office to continue to discuss settlement.

10. At that February 1999 meeting, TCU presented a revised proposal that increased the present value of benefits for the pre-1991 group by $1.9M over the then-current plan terms (assuming this Court's September 1997 ruling would be sustained on appeal), and about $700,000 over its original proposal. For this older group, the present value of benefits under TCU's revised proposal was about $10M less than if the Retiree Subclass were to succeed in reversing this Court's September 1997 decision, and about $3M less than my counteroffer. TCU's revised proposal also increased the present value of benefits for the post-1990 group by $3.3M over what that group would receive if TCU prevailed, or about $1M more than under TCU's original proposal. TCU essentially accepted my counteroffer for this group, *i.e.* 3 third-anniversary COLAs; the present value of accrued benefits for this group was $20.6M.

11. The parties continued settlement discussions in February and March 1999. In late March, I made another counterproposal demanding more on behalf of the Retiree Subclass, based in part on the belief that an intervening Supreme Court decision bolstered the Retiree Subclass' position. My second counterproposal was essentially a make-whole proposal that would have increased the present value of benefits for the Retiree Subclass by about $14M. Plaintiffs' counsel rejected that second counterproposal several days later. At around the same time, this Court invited the parties to participate in settlement discussions with the assistance of Magistrate Judge Paul Grimm. The parties met with Magistrate Grimm three times, in April and May. On behalf of the Retiree Subclass, I agreed at our last meeting with Judge Grimm to accept as a settlement of this litigation the benefit improvements set out in the Settlement Agreement and Notice.

* * *

The Retiree Subclass Has Been Adequately Represented

22. During the course of this litigation, I have kept Mr. Santoro informed of all substantive developments. He has actively encouraged me to pursue a settlement that would result in members of the Retiree Subclass receiving benefit improvements as soon as possible, and in a manner that would not result in termination of the Plan. At the same time, Mr. Santoro and I agree that we are prepared to litigate this action and appeal any adverse rulings of the Court which we believe should not stand.

23. I also made every attempt to inform Robert J. Devlin of the status of settlement discussions in this case. I provided Mr. Devlin and his attorney, Arthur M. Wisehart, with information made available to me during settlement negotiations, including plaintiff and Retiree Subclass settlement proposals, Plan valuations, cost estimates and other documents prepared by William M. Mercer, the Plan's actuarial consultants, and documents related to the *Bobo* litigation.

24. In agreeing to the proposed settlement, I was mindful of potential claims of Subclass members arising out of matters other than the elimination of the COLA. Two such claims came to my attention: Mr. Devlin's claim that the current Trustees had breached their fiduciary duty as a result of their poor oversight of one or more investment managers; and Clay B. Wolfe's claim that the Plan had erroneously treated him as having retired prior to 1991 for purposes of the COLA. I advised both Mr. Devlin and Mr. Wolfe that, in my opinion, neither claim was barred by the release in the proposed settlement agreement. I advised Mr. Wolfe that the Plan would undoubtedly assert other defenses to his claims.

25. Shortly after the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing was sent

to class members in September 1999, I received phone calls and written inquiries from members of the Retiree Subclass about the proposed settlement, as well as written objections to the proposed settlement. I had one or more lengthy and substantive phone conversations with 10 class members. Some of the Subclass members I spoke to were angry that, in 1993, the Plan had changed the valuation factors used to calculate the joint and survivor annuity form of benefit. Many also objected to TCU's decision to charge retirees for a portion of their health insurance cost. I attempted to explain that these benefit changes were unrelated to the issues in this case. Eight of the 10 individuals indicated they did not object to, or supported, the proposed settlement.

26. Retiree Subclass member Clay B. Wolfe objected to the proposed settlement on the basis that the Plan had treated him as a pre-1991 retiree when the COLA was eliminated in November 1997 for pre-1991 retirees, after having treated him as a post-1990 retiree for purposes of the 1993 change in actuarial factors that reduced his monthly joint and survivor annuity benefit in order to account for the COLA. I requested of Plan counsel that the Plan treat Mr. Wolfe as a post-1990 retiree and informed him of my belief that Mr. Wolfe was correct in stating he was a post-1990 retiree. The Plan rejected my request and, through counsel, informed me that Mr. Wolfe's claim that the Plan had erroneously determined his retirement date as December 31, 1990 rather than January 1, 1991 was not barred by the release.

27. I have been practicing law in the employee benefits area since approximately 1987, when I began working on single-employer plans for exempt organizations. In that same year, I received a Master of Laws in Taxation from Georgetown University Law Center. In addition to benefits law, I have been practicing labor and employment law on behalf of unions and individuals since 1980, after 2 years in the Appellate Court Branch of the National Labor Relations

Board in Washington, D.C. I have represented employees in class actions involving COBRA continuation coverage, valuation of account balances under terminated defined contribution plans, and Equal Pay Act violations. My practice also includes advising and litigation on behalf of multiemployer pension and health and welfare funds, single-employer plans, joint labor-management plan administration committees, and plan participants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Civil Docket No. JFM-97-3464

R. A. SCARDELLETTI, *et. al.*,
Plaintiffs,

v

ANTHONY SANTORO, *et. al.*,
Defendants.

Baltimore, Maryland
November 12, 1999
11:30 a.m.

TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

THE COURT: All right. I have reviewed the extensive memoranda and supporting papers that been filed in connection with this case and I certainly do not want to hear direct testimony from those who have submitted affidavits and frankly, I'm not sure what's left to be said by the presentation of testimony. Mr. Wisehart—

MR. WISEHART: May I respond to that, Your Honor?

THE COURT: All right. You can respond. I suggest you be careful in what you say today. I don't like what you've done in this case in terms of attacking counsel and I suggest that you not make any oral attacks here or you're going to have my ire expressed to you. I deny your Motion to Intervene. It is absolutely untimely. Writing letters to me—I

don't have to respond to letters from counsel. If you wanted to file a Motion to Intervene, you should have filed a Motion to Intervene. You never did it. I'm certainly going to hear the objections that have to be made. That's what a fairness hearing is all about. But there's absolutely no indication to me that there was collusion between the lawyers. The fact that the person who was appointed's father is still with the T.C.U. makes no difference to me whatsoever. I find no basis for collusion. There is absolutely no reason for you to intervene. You as I recall it were given a chance to—you were here and you opted out, "opted out" of representing this subclass a long time ago. I gave you a chance to be here and all you're doing now is to try to come back and throw a monkey wrench in things. And Mr. Wisehart, I don't like what you've done and I will tell you that. I've read the papers and I just suggest to you to be very careful because I have a temper and I don't want to lose it with you. And if there's anything you had to add to what's in the papers, I'll hear from you. But if you simply repeat what you've said that I've reviewed, I reject it and I deny your Motion to Intervene. You're here not as a party. You are here representing an objector. So let's be clear exactly what the tone of this hearing is going to be vis-à-vis you and me.

MR. WISEHART: Very well, Your Honor. What as an objector I would propose subject to Your Honor's desire is to put Mr. Devlin on as a witness to talk about his personal knowledge of when the COLA was adopted.

THE COURT: I don't need that. I know that from the papers. That's a waste of my time.

* * *

MR. WISEHART: As you know that I was not involved in Bobo, Your Honor. And the fact is that Bobo was settled and the result of the settlement did not cast in concrete the decision that was reached by Your Honor and Mr. Devlin's

testimony was not heard and these would be factual issues that would present new evidence. As far as I can tell, Your Honor, with all due respect—

THE COURT: If you had wanted to do that, you should have filed a proper Motion to Intervene at the appropriate time and you didn't do it and you can't come in here now at this late moment and do it.

MR. WISEHART: Your Honor, you had already made that decision before I even knew about it—

THE COURT: No. If you had wanted to get involved in these proceedings. You're trying to raise it now and introduce new evidence. You should have done it back, you know, when you're writing me letters. The federal judges are too busy to respond to letters, argumentative letters from counsel.

MR. WISEHART: My client did not have the funds. You were told that. You knew that. I respectfully say—

THE COURT: You had an opportunity to be here and chose not to pursue this. For whatever reason, you didn't want to do that.

MR. WISEHART: I didn't have the funds to do that.

THE COURT: Whatever reason you chose not to be here, you chose not to be here.

MR. WISEHART: You were told—

THE COURT: Mr. Devlin had been selected. And don't overtalk me. We've got a court reporter here.

MR. WISEHART: We did not have the funds to do that and you were so advised.

THE COURT: My recollection was you said that you didn't have the expertise. But my recollection might be hazy on that.

MR. WISEHART: Well, after—you asked me if I could take on the issue of whether or not the benefit was initially put on as a matter of, was void when it was initially put on. And I said I didn't have the background in that issue. And in responding candidly to your question, you said all right, I want that issue aggressively litigated. And you said that I should not appear for the class. That's the way it went.

* * *

MR. WISEHART: What I want to say is that financially there does appear—now I do know that Your Honor wants to do equity in this case and I appreciate and understand that, Your Honor. But from the financial records that we have available, it appears to us that instead of trimming the past COLA's to the drastic extent that has been done, the COLA could be made differently and there could be funds made available for that purpose. There are several options that are available.

* * *

THE COURT: Okay. I reject that as a basis for rejecting the settlement. It's speculative and I'm not going to consider it. I don't think that kind of speculation should come in to me approving the settlement. So if I'm wrong, you got an appeal. I think that that is not a matter which has sufficiently matured to be able to, for me to be able to consider adequately today.

MR. WISEHART: All right.

THE COURT: And not for me to consider adequately, but to consider it as a basis for not approving the settlement.

MR. WISEHART: Well, then I have another option, Your Honor. The affidavit that has been submitted by Mr. Rudin, the actuary, refers in paragraph 13 to going to the voluntary termination route through the Pension Benefit Guarantee Corporation. But there is another alternative. And the other alternative which is set forth in the statute is called a distress

termination. A distress termination I'm informed is not a difficult thing to do. The statutory criterior have been relaxed to the extent that if the debts of the sponsoring entity appear to be insufficient to pay its obligations, they can go to the PBGC. And as I understand the procedure, it's a well-settled procedure. There is a form you use and the PBGC responds within 60 days. And what the PBGC does is decide whether or not the assets are sufficient to pay the liabilities of the pension plan. And if it is not, then the PBGC acts as an insurance agency. The pension plan has been paying premiums all these years to the PBGC. It's $19 per employee per year plus an adjustment depending upon the circumstances. And if the pension plan qualifies for treating this as a distress termination, then the PBGC pays the amount needed to fund those benefits. Now this gets to the question of whether or not these would be considered an accrued benefit.

THE COURT: That is an issue that has been decided and that for purposes of determining—we're not going to revisit that.

MR. WISEHART: No. I'm not asking—

THE COURT: What's important here is that counsel have gauged their litigation risk and based upon the rulings I have previously made.

MR. WISEHART: I'm not asking that you do that. I'm suggesting something that I think might appeal to you as being pragmatic. The PBGC was not a party to this litigation at any time. I am informed that under the PBGC's practices, that it would consider this COLA to be an insurable benefit. If that is true and since these premiums have been paid, then it would seem to me that the fiduciary duty is on the plan sponsor to seek to avail itself of that guarantee and it will not cause any disturbance of these proceedings if that application were made to the PBGC. And the PBGC could make a determination.

* * *

THE COURT: All right. Well, let me hear from Mr. Hanrahan about this distress termination and recovering and having the pension board pick up their tab.

MR. HANRAHAN: Good morning, Your Honor. A distress termination requires that the plan sponsor either be in bankruptcy or be on the brink of bankruptcy as a result of attempting to maintain the plan. In 1994, we approached PBGC to talk with them about whether there was some kind of means of terminating the plan that would deal with the COLA and would allow the surviving sponsor to continue in existence. Their answer in 1994 was that if the plan were terminated in a distress termination, by their estimate, they would have a claim of approximately $16 million against the plan sponsor for guarantee benefits. They didn't get into the question of the additional claim they would have for benefits in excess of the guarantee which if they could recover they would be able to pay. I think they realized then, I think they realize now because we've kept them informed of the progress of this case, including the settlement, that the settlement is the appropriate way to resolve this intractable problem. If the plan were terminated today, it is incredibly unclear whether the PBGC would even look at the COLA that was removed in 1997 as a benefit payable under the plan. Even if they did, they would look at it as a benefit that would stop increasing at the time of termination. And even if they did that, they would still cut back the benefits payable to retirees on account of COLA beeause of a rule that says benefit increases that have been in effect for less than five years are not fully guaranteed.

* * *

THE COURT: And let me say on that because I mean it's one of the reasons that and I will say this for a reviewing court and if I'm wrong, so be it. But there may be as well be an honest statement by the district judge on this. One of the

reasons I said what I said to Mr. Wisehart when I came out is that as far as I am concerned and I am still subject to my finally understanding all of this. In terms of the process, in terms of the quality of the lawyering, in terms of the good faith that Mr. Hanrahan, Ms. Kraft and Mr. Johnson have put into this, it has been absolutely outstanding. They were confronted with a terrible, terrible problem in which the whole, everybody could have been hurt. The ship could have wrecked and nobody would have known what happened. There were problems of fairness. I think they have done an absolutely remarkable job based upon what I've read and hearing it one more time and that is one of the reasons—somebody wants to come in and object to a settlement, they've got a perfect right to do that and I take no offense at that at all. But to attack counsel who—I have been presiding over this and the Bobo proceedings. And although I haven't obviously been involved in the settlement here, I know how difficult the problems have been. I know how good the lawyering has been. I know that there's been no collusion among the lawyers. That in fact I know in terms of an objective fact that they were negotiating hard and in fact at one point despite their good faith in recognizing that a diplomacy was what was needed to try to save this ship of state for everybody, it might not work and they finally had to go to Judge Grimm who did a good job to help work out the differences. So in terms of the process here, I am absolutely convinced that they were first rate lawyers who absolutely were representing their clients vigorously and who did an outstanding job and I want to thank you all for doing this. Now whether or not at the end of the day, I'm going to approve what you did is going to depend upon —I'm inclined to do it. There's no question that I am. But I want to hear it one more time. But to attack the counsel in this case on a personal level for being collusive, I find offensive because they were absolutely in my judgment everything other than collusive. They were absolutely professional and I thank you.

* * *

THE COURT: Now the question is if you all think we should add something, we could break for lunch and come back at 2:00 or does that make sense to everybody so that we're not—

MS. KRAFT: That might be a good idea. Mr. Wolfe has traveled up from Florida and his situation is a little bit different and I think he'd like an opportunity to explain—

THE COURT: I understand. I would like to do something for Mr. Wolfe, too, but I'm not sure I can do it.

* * *

THE COURT: I'm still not, don't quite understand the issue because I'm not understanding why the, what happened in '97. Mr. DeWolfe focuses upon losing his COLA then, how that is impacting. I understand what Mr. Hanrahan has said. That it's the reductions after the COLA that he's been making—his benefits were reduced to "pay" for his wife's extended benefit because of her longer life expectancy.

MR. HANRAHAN: Let me try to illustrate this with an example which I think will give you the flavor of this. Let's assume his monthly benefit was $100 straight life annuity when he retired in 1991, began receiving an annuity. Look at his life expectancy, the life of expectancy of him and his wife and you make a reduction assuming no COLA's to $95 a month for him and she'll get half of that when he dies. In 1993, because the new actuary realized that there had never been an adjustment in those reduction factors and they went back and said the reduction should have been to $92.

THE COURT: Because of the COLA

MR. HANRAHAN: Because of the COLA.

THE COURT: So it's the 10% that was given plus the 10% every three years.

MR. HANRAHAN: Yeah. In 1997 when the COLA was removed from the plan, he reverted back to $95. What he's saying is that for every month during that period from '93 until near the end of '97, he was being overcharged, he had paid $3 for the COLA. That, you know, you can multiply that out and there's an amount of money that he says he paid for something that ultimately he's not going to get because the COLA was eliminated.

THE COURT: And the other people that would apply to are whom? Obviously, you have to have the joint survivors. You have to—

MR. HANRAHAN: That's right.

THE COURT: You have to have that. That's condition number one.

MR. HANRAHAN: And condition number 2 is that your benefit amount was readjusted in 1993 to take account of the COLA.

THE COURT: Right.

MR. HANRAHAN: And then in 1997 and this would have happened uniformly to this group of people, they reverted back to the old joint and survivor annuity factor that had nothing do with the COLA.

THE COURT: And these are people who retired in what window?

MR. HANRAHAN: From 1991 through October 31, 1997.

* * *

. . . [THE COURT]: I've heard it is a unique problem and—

MR. HANRAHAN: We'll do our best to resolve this as quickly as we can if it's possible to do.

THE COURT: And if it's not going to adversely affect anybody else, I'm not—it doesn't concern me particularly that it wasn't in the notice.

MR. HANRAHAN: Yeah. I don't really see how it's going to adversely affect anyone else.

* * *

THE COURT: Mr. DeWolfe, if I approve this at the end of the day, what we're going to do is to—I'm going to approve it tentatively subject to working it out. I can't give you any guarantees, but people are going to try to fix this.

* * *

MR. WISEHART: Your Honor said earlier that your decision would be subject to appeal and before the thing becomes effective.

* * *

THE COURT: No. I understand your position on this. Let me ask you a conceptual thing here. You are appropriately looking for the best avenue to essentially keep your clients' pension, to get it back to where it was when this COLA which should never have been given was. I appreciate that and that was in your view and your clients' view the fairest thing. But there are risks in that position that have been set forth by class representative and his counsel. But finally, when I have to judge overall fairness and tell me if I'm wrong, of course, I have to make sure that people aren't being treated unfairly vis-a-vis one another and there has to be general equity. Look, I wouldn't want to have had my pension reduced and for everything I've said, I understand Mr. Devlin's position on this and I feel bad for him. But I have previously found that the COLA should never have been given. But be that as it may, conceptually, assuming that somebody isn't being mistreated, my job finally is, is it not, today to decide overall fairness. And I can't for the life of me

see how in making that determination because this might be best for your client, that essentially, I should adopt an approach that would have this plan go up on the rocks. How could that possibly be fair to other people including the active class? How could that possibly be so to have this plan even if we could get a prompt determination where the result is that the plan hits the rock and goes and there's a distress termination?

MR. WISEHART: Well, that is a point that involves a matter of equity that I respectfully submit that Your Honor has not really focused on.

THE COURT: Well, what have I missed?

MR. WISEHART: The people who have retired have given their all. They have no further employment options. And it's not just the people who've retired and who will die shortly as was callously pointed out before, as Mr. Wolfe says, it's so their—it's Mr. Devlin's widow when that happens and we had a Mr. Clark, the oldest member of the RPA group who was 99 years old who just passed away last week. And what is at issue is the destruction of an entire lifestyle.

* * *

THE COURT: Well, there's been some heat during this hearing for which I know I've been in large measure responsible and I apologize if I've made it personally unpleasant for anybody. I certainly have not meant to. But these are difficult proceedings in which things can get out of control and unfocused and in which really major matters for all affected parties are at stake and I do not want to lose the forest for the trees. And in the final analysis, I am prepared to rule subject to hearing back from Mr. Hanrahan on the Mr. Wolfe issue.

I ultimately am called upon to determine whether the settlement that has been proposed is fair. And under the

Jiffy Lube case, I am to consider the following factors. The posture of the case at the time settlement was proposed. The extent of discovery that had been conducted at that time, the circumstances surrounding the negotiations and experience of counsel in the area of class action litigation and those four factors I am to consider in making what under Jiffy Lube is an essential inquiry whether the settlement was reached as a result of good faith bargaining at arm's length without collusion.

For all of the reasons set forth in the papers submitted by the plaintiff and the two classes and the two subclasses, the defendants, all of these, all of the Jiffy Lube factors make it clear that the settlement is a result of good faith bargaining at arm's length without collusion. As set forth in the papers, really the Bobo discovery and the findings I had made provided a factual basis for analysis of the desirability and the viability of settlement and we all know the findings that I did make there.

There are litigation risks for everybody even in light of my Bobo findings and I will not go through them all again. But number one, my finding that there had been a breach of fiduciary duty was one which could have been rechallenged and I guess there was a risk that on both sides as to how that would, you know, if that were determined, but I guess mainly by finding there would have been overturned, it would have been risk for the active, for the people. Excuse me. It's late in the afternoon. Of course, I've got two classes and two subclasses, number one. But essentially there's a litigation risk posed by that. There's the litigation risk concerning what finding would be made vis-à-vis my ruling on whether or not the 10% COLA had been an accrued benefit. There was a litigation risk that even if there was a breach of fiduciary duty whether or not I could fashion a remedy within the principles of equity and under the law that would undue that COLA. There was a collection risk that even if the retiree subclass

and the pre-January 1991 subclass had prevailed on everything, had overturned my finding about breach of fiduciary duty and/or hadn't been able to fashion relief to undue the COLA or if it had found to be the accrued benefit, there is a very realistic collection problem that they would have because the effects of all of their victories would have upon the viability, the financial viability of the plan. I'm absolutely unpersuaded that termination of this plan either voluntarily or by distress would have been in anybody's benefit. It would have just, would have been killing I can't say the golden good here because the goose may no longer be golden. But it would be absolutely destructive of everybody's rights and interests and I just think Mr. Wisehart is wrong about that and to steer the ship onto the rocks would be devastating for everybody.

There is absolutely no question in this case that counsel who negotiated the settlement are extremely experienced and extremely good as I said before. And they represented their clients to the fullest. Even today Ms. Kraft was trying to help Mr. Wolfe out again although recognizing that she was in a somewhat ambiguous position and Mr. Hanrahan, too. I mean negotiations were both hard-fought and they were fair and I could just see that from what was going on. I've known it frankly from dealing with counsel throughout this litigation. That they're not going to give an inch on something they shouldn't give an inch on because they're highly professional. On the other hand, they want to be fair. On Mr. Hanrahan's side if he sees a legitimate issue, he's going to try to respond to it consistent with his obligations to his client. And although Mr. Johnson and Ms. Kraft are fair and fairminded, they're not going to give up anything they shouldn't for their clients. So I'm absolutely persuaded of that. And I know also just objectively that however good they were and however hard they were trying, the settlement almost wasn't achieved because they had reached an impasse because of what they thought what their obligations to their clients and it

took the intervention of a or the assistance, I wouldn't say intervention, but the assistance that they called upon of an extremely able and conscientious magistrate judge to help them find a solution to the problem.

I'm absolutely persuaded that the settlement is adequate. I've been through the litigation risks that people faced which bear upon the five factors that are conventionally said to bear upon or the first two of the factors that are said to have bear upon the praise and the adequacy of the settlement, the relative strength of the case on the merits, the existence of any difficulties of proof or strong defenses. Third, we have here anticipated duration and expense of anticipated litigation. I think the plaintiffs point out that that may not be the strongest factor here, but there would be continued delay. The expense is probably not such a factor here. But there would be a continued delay and this is a problem which just cries to be solved now and it's been going on for so long. One of the reasons it's so difficult is because people had to try to take interim measures to keep the plan afloat which simply made the problem even more complicated and more difficult to resolve. If we went to another stage, another degree of complexity it might make it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it. So more delay wouldn't be to the benefit of the retiree class, particularly those who've retired before 1991. It's not cynical to say it. It's not callous to say it. It's a fact of life. And as I say, just more delay, more complexity would make it, might make it impossible ever to resolve this issue which cries for resolution. The degree of opposition of the settlement really, it is remarkable how little opposition has been expressed. The number of objectors is in the 20's. Is it 24?

MR. HANRAHAN: Twenty-four, Your Honor.

THE COURT: Twenty-four people. And that to me shows what a remarkable job counsel has done. There was fair

notice in this case. And the bottom line is that this settlement not only is extremely fair, it is a testament to the best of the best of what the law profession with the assistance of other professions can achieve. It is diplomacy in the highest sense of the word, not simply being nice to one another. But on resolving very difficult disputes on which they're legitimate, different perspectives in a constructive manner. And so this settlement is in my judgment is supremely fair and subject to hearing to try and to resolve this one remaining issue is one that I have absolutely no hesitancy in approving. Whether or not if this problem can't be worked out, I'm not saying I won't approve the settlement. I'm just hoping that the problem identified by Mr. Wolfe can be seen to be discreet and manageable both from a financial point of view and from a legal point of view and that he is not getting for himself and the people who he identified as having a similar problem something to which they aren't entitled in light of what everybody else is giving up. But as has been described today, it looks to me like it may be an isolated problem which is manageable and I have no problem with the fairness of the notice because if that is so, it is a unique problem and if what I've been told about the financial implications are such, to resolve that problem isn't going to have any impact upon the financial integrity of the plan which would otherwise impact upon the other people.

So counsel, I commend you. I thank you and subject to what I've said, I approve the settlement.

MR. HANRAHAN: Thank you, Your Honor.

(Proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

MOTION OF PLAINTIFF TRUSTEES FOR A PRELIMINARY INJUNCTION PURSUANT TO THE ALL WRITS ACT

Plaintiff Trustees hereby move the Court, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), for a preliminary injunction barring defendant class members Robert J. Devlin, Andrew Hagan, Thomas Hewson, Frederick Rinckwitz, individually or through the Retired Employees Protective Association ("REPA") (of which Mr. Devlin is the President), as well as all other members of the defendant class, from prosecuting in any court, except this Court, the United States Court of Appeals for the Fourth Circuit, or the United States Supreme Court, claims which are addressed in the Settlement Agreement and Release this Court has provisionally approved, or which concern the conduct or resolution of the above-captioned litigation.

The relief we seek includes a prohibition on further proceeding on claims directly related to the instant action, including those contained in a Proposed Amended Complaint in the case captioned *Devlin, et al. v. TCU, et al.*, Nos. 95 Civ. 0742 and 95 Civ. 10838 (S.D.N.Y.) (Proposed Amended Complaint filed on July 9, 1999), and an Amended Complaint

filed on January 21, 2000, in the case captioned *Devlin, et al. v. Scardelletti, et al.*, No. 00 Civ. 0043 (S.D.N.Y.). Each of these pleadings raises claims which conflict directly with prior decisions of this Court and which would interfere with this Court's continuing jurisdiction over the settlement of this action. The latter case involves claims of more than $23-million against class counsel Barbara Kraft, Trustees' counsel William Hanrahan and his law firm, relating to their conduct in this case.

The requested relief is authorized by the All Writs Act as necessary and appropriate in aid of the Court's jurisdiction. *See In re March*, 988 F.2d 498 (4th Cir. 1993).

WHEREFORE, plaintiff Trustees respectfully request that this Court: (1) enjoin Messrs. Devlin, Hagan, Hewson and Rinckwitz, and REPA, to dismiss the pending action in the Southern District of New York captioned *Devlin, et al. v. Scardelletti, et al.*, No. 00 Civ. 43 (S.D.N.Y.), and to withdraw their motion to amend their complaint in the pending action captioned *Devlin, et al. v. TCU, et al.*, Nos. 95 Civ. 0742 and 95 Civ. 10838 (S.D.N.Y.) to the extent that motion raises claims concerning the 1991 COLA; (2) enjoin Devlin, Hagan, Hewson, Rinckwitz and REPA, as well as all members of the defendant class, from taking any action against counsel in this case, or their law firms; and (3) enjoin Devlin, Hagan, Hewson, Rinckwitz and REPA, as well as all members of the defendant class, from making any filing in any forum that raises issues disposed of here or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court.

Respectfully submitted,

/s/ _____

WILLIAM F. HANRAHAN
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January 31, 2000

CERTIFICATE OF SERVICE

I hereby certify that copies of the Plaintiffs' Motion For A Preliminary Injunction, the Memorandum In Support thereof, the Appendix thereto, and a proposed Order were sent on January 31, 2000, by overnight delivery service to:

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/s/ _____
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*,
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on the motion of Plaintiff Trustees for a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Upon consideration of the motion, the memorandum in support thereof, and the opposition thereto, and upon finding that an injunction is necessary and appropriate in aid of this Court's jurisdiction, it is hereby

ORDERED, that the motion is GRANTED, and it is further

ORDERED, that Messrs. Devlin, Hagan, Hewson and Rinckwitz, and REPA, are hereby enjoined to dismiss the pending action in the Southern District of New York captioned *Devlin, et al. v. Scardelletti, et al.*, No. 00 Civ. 43 (S.D.N.Y.); and it is further

ORDERED, that Devlin, Hagan, Hewson, Rinckwitz and REPA, as well as all members of the defendant class, are enjoined from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action

or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court.

IT IS SO ORDERED, this 1st day of March, 2000.

/s/ _____
J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*
Plaintiffs,

v.

ANTHONY SANTORO, SR., *et al.*,
Defendants.

FINAL ORDER

This matter having come before the Court on the motion of the plaintiffs for approval of the settlement set forth in the Settlement Agreement and Release ("Settlement Agreement"), and the responses of the Defendant Class thereto, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed and good cause appearing therefor, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. For purposes of settlement, the Defendant Class is defined to consist of all active, terminated vested and retired participants in the Transportation Communications International Union Staff Retirement Plan ("Plan") and their beneficiaries, except R.A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Howard Randolph, Mitchell M. Kraus, Donald A Bobo, R.I. Kilroy, F.T. Lynch and Frank Mazur; and the Defendant Class is divided into a Retiree Subclass made up of all members of the Defendant Class who retired or terminated service under the Plan prior to January 1, 1999, and their beneficiaries; and an Active Subclass, made up of all members of the Defendant Class who had not retired or terminated service under the Plan prior to January 1, 1999, and their beneficiaries.

2. The requirements to certify a class under Rule 23(b)(1) of the Federal Rules of Civil Procedure for purposes of settlement have been satisfied and the Defendant Class is certified for settlement purposes under Rule 23(b)(1) of the Federal Rules of Civil Procedure.

3. The notice given to the Defendant Class concerning the Settlement Agreement provided fair and reasonable notice to the Defendant Class of the nature of this action, the proposed settlement, and the right to appear and be heard concerning the proposed settlement and satisfied the order of this Court concerning notice to the Defendant Class and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

4. The Settlement Agreement is approved and is, in all respects, fair, reasonable and adequate to the Defendant Class and all of its members in accordance with Rule 23 of the Federal Rules of Civil Procedure and was negotiated and entered into in good faith.

5. The amendment to the Plan adopted October 13, 1990 providing for an automatic cost of living adjustment effective January 1, 1991 is null and void as of its adoption and of no force or effect and Article 5.5(a) of the Plan document Restated to Reflect All Amendments Adopted Through March 3, 1999 is null and void and shall not be enforced.

6. Without affecting the finality of this Order, the Court retains jurisdiction over implementation and enforcement of the Settlement Agreement.

7. This action is dismissed with prejudice.

Dated: March 15, 2000

/s/ _____
J. FREDERICK MOTZ
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*

v.

ANTHONY SANTORO, SR., *et al.*

MEMORANDUM

The Fourth Circuit has remanded this action for the sole purpose of having me set forth my reasons for issuing an injunction under the All Writs Act in accordance with Fed. R. Civ. P. 65.

The reason for my issuance of the injunction is that Robert Devlin has, by his pattern of conduct, demonstrated that unless he is enjoined, he will institute litigation in other districts to undermine the class action settlement this court has approved (a ruling that has now been affirmed by the Fourth Circuit).[10] This pattern is evidenced by other cases that Devlin filed both before and after the settlement agreement was approved while this action was pending. After I ordered recission of the 1991 COLA, Devlin filed two actions in the Southern District of New York, seeking a preliminary injunction to restore the COLA. The New York court denied the motion, finding that this court was the proper forum in which such a motion should be filed. The Second Circuit affirmed. Thereafter, Devlin sought to amend his

---

[10] Devlin has been joined in the litigation he has instituted by other members of the retiree subclass. I will refer to this group collectively as "Devlin."

complaint in the New York actions to reassert the same COLA claims previously raised and rejected. In the proposed amended complaint Devlin claimed that "the entire proceeding in Maryland" had been "tainted." The New York court denied the motion for leave to amend.

After this court had granted preliminary approval to the settlement agreement, Devlin sought to intervene. I denied the motion to intervene as untimely but Devlin and his counsel did attend the fairness hearing. Devlin appealed my denial of his motion to intervene and my approval of the settlement agreement. My rulings were affirmed by the Fourth Circuit on appeal.

Notwithstanding my approval of the settlement agreement, while the approval was pending, Devlin instituted another action in the Southern District of New York alleging that the prosecution of the present suit by the Trustees was a breach of their fiduciary duties and that the settlement of this litigation was the product of collusion. Self-evidently, the institution of that action constituted an attack upon my approval of the settlement agreement and was an attempt to circumvent the jurisdiction not only of this court but also of the Fourth Circuit in which the appeal of my rulings was to be heard.

It was against the background of these lawsuits that on March 15, 2000, I entered an injunction requiring Devlin to dismiss the breach of fiduciary complaint in the Southern District of New York. Even then, Devlin did not comply with the injunction but instead moved for reconsideration of the Southern District's decision in the original New York actions denying leave to file an amended complaint. Only after I advised Devlin that his failure to comply with my injunction would subject him to contempt did he withdraw the breach of fiduciary complaint and his motion for reconsideration in the original actions.

"The All Writs Act empowers a federal court to enjoin parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments." *In re March*, 988 F.2d 498, 500 (4th Cir. 1993); *see also United States v. Cohen*, 152 F.3d 321, 325 (4th Cir. 1998) ("where an injunction is proper in order to protect or effectuate the judgments of a federal court, it is within that court's power to issue the injunction under the All Writs Act."). Here, Devlin's actions clearly were an attempt to relitigate issues I had decided and to collaterally attack my rulings, including my approval of the settlement agreement. Nothing short of an injunction (and, as it turned out, the threat of the imposition of contempt sanctions) deterred him from his conduct. Moreover, he has suffered no cognizable harm as the result of the issuance of the injunction since, as both the United States District Court for the Southern District of New York and the Second Circuit have recognized, this court is the only appropriate forum for him to challenge, directly or indirectly, the class action settlement agreement.

A separate order re-issuing the March 15, 2000 injunction is being entered herewith.[11]

Date: November 20, 2001

/s/ _____
J. Frederick Motz
United States District Judge

[11] The preliminary injunction I entered on March 15, 2000 required that Messrs. Devlin, Hagan, Hewson, Rinckwitz, and REPA were enjoined to dismiss their breach of fiduciary complaint in the Southern District of New York. In light of the fact that that action has now been dismissed, the accompanying preliminary injunction order deletes that clause.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-97-3464

R.A. SCARDELLETTI, *et al.*

v.

ANTHONY SANTORO, SR., *et al.*

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on the motion of Plaintiff Trustees for a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). For the reasons stated in the accompanying memorandum, it is hereby

ORDERED, that the motion is GRANTED; and it is further

ORDERED, that Devlin, Hagan, Hewson, Rinckwitz, and REPA, as well as all members of the defendant class, are enjoined from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court.

IT IS SO ORDERED, this 20th day of November 2001.

/s/ _____
J. Frederick Motz
United States District Judge

(7)

No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin was an appellant below. The Retired Employees Protective Association was also an appellant below.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parrish, Robert A. Parrish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 12
ARGUMENT 14
I. OBJECTORS SATISFY EVERY REQUIREMENT FOR APPEALING ESTABLISHED BY STATUTE, RULE, AND THE CONSTITUTION. 14
II. OBJECTING CLASS MEMBERS ARE "PARTIES" HAVING THE RIGHT TO APPEAL. 16
A. The Term "Parties" Encompasses All Persons Directly Bound by a Judgment, Not Merely the Named Representatives Acting as Agents for Multiple Individuals. 16
B. Once the Class Is Certified, Objectors Are "Parties to the Judgment," and Therefore Have the Right to Appeal. 24
III. THE FOURTH CIRCUIT'S RATIONALE FOR DENYING UNNAMED CLASS MEMBERS THE RIGHT TO APPEAL IS FLAWED. 28
A. An Objector's Appeal Does Not Usurp the Role of the Class Representative. 29

B. Appeals by Objectors Further Sound Principles of Judicial Administration And Preserve Objectors' Due Process Rights..... 32
C. Requiring Prophylactic Intervention in the District Court Poses a Greater Threat to Class Management than Does a Right to Appeal Based on Objections under Rule 23(e)..... 36
IV. IF INTERVENTION IS REQUIRED, IT SHOULD BE FREELY GRANTED AND DEEMED SUFFICIENT FOR PURPOSES OF APPEAL IF AT LEAST SOUGHT SOON AFTER THE DENIAL OF OBJECTIONS. 41
CONCLUSION..... 43

TABLE OF AUTHORITIES

Pages

Cases

Adams v. *Robertson*, 520 US 83 (1997) 34
Amchem Products, Inc. v. *Windsor*, 521 U.S. 591 (1997)..... passim
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)..... passim
Bayard v. *Lombard*, 50 U.S. (9 How.) 530 (1850)..... 19
Bell Atl. Corp. v. *Bolger*, 2 F.3d 1304 (CA3 1993)..... 11, 33
Berger v. *Iron Workers Reinforced Rodmen*, 170 F.3d 1111 (CADC 1999)..... 34
Blossom v. *The Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863)..... 22, 23
Board of School Comm'rs v. *Jacobs*, 420 U.S. 128 (1975) (per curiam)..... 29
Bowling v. *Pfizer, inc.*, 102 F.3d 777 (CA6 1996)..... 25
California Pub. Employees' Retirement Sys. v. *Felzen*, 525 U.S. 315 (1999) (equally divided court)..... 2, 16, 18
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983)..... 42
Cooper v. *Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984)..... 27
Crawford v. *Equifax Payment Servs., Inc.*, 201 F.3d 877 (CA7 2000) 36
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983).... 42
Felzen v. *Andreas*, 134 F.3d 873 (CA7), *aff'd by equally divided Court*, 525 U.S. 315 (1999) 18
Franks v. *Bowman*, 424 U.S. 747 (1976) 29

General Telephone Co. of the Southwest v. *Falcon*, 457 U.S. 147 (1982) 45

Guthrie v. *Evans*, 815 F.2d 626 (CA11 1987) 44

Hansberry v. *Lee*, 311 U.S. 32 (1940) 28

Hinckley v. *Gilman, Clinton, & Springfield R.R. Co.*, 94 U.S. (4 Otto) 467 (1876) 19, 23

Hovey v. *McDonald*, 109 U.S. 150 (1883) 23

In re Brand Name Prescription Drugs Antitrust Litig., 115 F.3d 456 (CA7 1997) 18

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (CA7), *cert. denied*, 444 U.S. 870 (1979) 31

In Re Leaf Tobacco Board of Trade, 222 U.S. 578 (1911) (per curiam) 19

In re Navigant Consulting, Inc., Secur. Litig., -- F.3d --, 201 WL 1646846 (CA7 Dec. 26, 2001) 16, 18, 25

In re PaineWebber, Inc. Ltd. P'ships Litig., 94 F.3d 49 (CA2 1996) 11

Indiana Southern R. Co. v. *Liverpool, London & Globe Ins. Co.*, 109 U.S. 168 (1883) 20

Kaplan v. *Rand*, 192 F.3d 60 (CA2 1999) 33, 43

Kremens v. *Bartley*, 431 U.S. 119 (1977) 29

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 15

Marino v. *Ortiz*, 484 U.S. 301 (1988) 10, 17, 19, 21

Mars Steel Corp. v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677 (CA7 1987) 38

Marshall v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977) 11

Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 27, 40

Minnesota Co. v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609 (1865) 23

National Center for Immigrants' Rights v. *INS*, 892 F.2d 814 (CA9 1989) 18

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) ..... passim

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 28, 39, 43

Rogers v. *National Union Fire Ins. Co. of Pittsburgh*, 864 F.2d 557 (CA7 1988) 24

Rosenbaum v. *MacAllister*, 64 F.3d 1439 (CA10 1995) 26

Sage v. *Railroad Co.*, 96 U.S. 712 (1878) 23

Scardelletti v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995) 4

Scardelletti v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997) 4

Smith v. *Swormstedt*, 57 U.S. 288 (1850) 27, 28

Snyder v. *Harris*, 394 U.S. 332 (1969) 25

Sosna v. *Iowa*, 419 U.S. 393 (1975) 29

Stewart v. *Dunham*, 115 U.S. 61 (1885) 26

Supreme Tribe of Ben-Hur v. *Cauble*, 255 U.S. 356 (1921) 25, 26

Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 18

Trustees v. *Greenough*, 105 U.S. 527 (1882) 23

United Airlines v. *MacDonald*, 432 U.S. 385 (1977) 46

United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 24

United States ex rel. Louisiana v. *Jack*, 244 U.S. 397 (1917) 19

United States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) 29

Walker v. *City of Mesquite*, 858 F.2d 1071 (CA5 1988) 12

Weinberger v. *Great Northern Nekoosa Corp.*, 925 F.2d 518 (CA1 1991) 37
Williams v. *Morgan*, 111 U.S. 684 (1884) 23, 24
Zahn v. *International Paper Co.*, 414 U.S. 291 (1973) 25

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 ..... 2, 15
28 U.S.C. § 1332 25
28 U.S.C. § 1332(a) 25
28 U.S.C. § 1332(c)(1) 26
29 U.S.C. § 1054 4

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Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE 10, 30
Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 HARV. L. REV. 356 (1967) 39
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No. 97-1732, Oral Arg. Trans. at 37 15
Samuel Issacharoff, *Class Action Conflicts*, 30 U.C.D. L. REV. 805 (1977) 35
Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) 35

Rules

Fed. R. App. P. 1(b) 15
Fed. R. App. P. 3 25
Fed. R. App. P. 3(c) 18
Fed. R. Civ. P. 19 34
Fed. R. Civ. P. 23(a)(2) 42
Fed. R. Civ. P. 23(a)(3) 42
Fed. R. Civ. P. 23(b)(3) ..... passim
Fed. R. Civ. P. 23.1 ..... 14, 16, 27
Fed. R. Civ. P. 24 ..... 10, 40, 42, 43
Fed. R. Civ. P. 24(c) 40
Fed. R. Civ. P. 26(b)(1) 29
Fed. R. Civ. P. 27 29
Fed. R. Civ. P. 33 29
Fed. R. Civ. P. 34 29
Fed. R. Civ. P. 65 13

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's orders denying petitioner's motion to intervene, approving the settlement, and entering a final judgment (Pet. App. B1, C1-C3) are unpublished. The Fourth Circuit's opinion (per Williams, J., joined by Anderson, D.J., sitting by designation; Michael, J., concurring in part and concurring in the judgment) (*id.* A1-A35) holding that petitioner lacks standing to appeal the settlement because he was not a named party in the district court is published at 265 F.3d 195.

JURISDICTION

The Fourth Circuit entered its opinion on July 27, 2001. The petition for certiorari was filed on September 7, 2001,

and granted on December 10, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

This case presents the question whether petitioner has the right to appeal a district court judgment that approves a class action settlement and thereby substantially reduces his retirement benefits. It is undisputed that petitioner is a class member directly bound by the judgment, timely objected to the settlement in the district court, has a substantial personal stake in overturning the judgment, and timely sought to appeal. A divided panel of the Fourth Circuit nonetheless held that petitioner could not appeal because, in the majority's view, appeals by class action objectors could undermine the orderly litigation of the case. Nor could petitioner appeal as an intervenor, the majority held, because he acted too late by not moving to intervene until he learned of the proposed settlement.

The court of appeals' decision is wrong as a matter of law and logic. Class action objectors – like derivative shareholders (cf. *California Pub. Employees' Retirement Sys.* v. *Felzen*, 525 U.S. 315 (1999) (equally divided court)) – satisfy all the criteria for appealing set forth in applicable rules, statutes, and the Constitution. Even if derivative shareholders do not have the right to appeal, the same cannot be said of members of a properly certified class, for (unlike derivative shareholders) they are "parties" directly bound by the judgment and they pursue their own personal interests on appeal (as opposed to the interest of a third-party

corporation). Petitioner's right to appeal cannot be abrogated by the prudential concerns articulated by the majority below, which, in any event, rest on profound misconceptions about class action litigation. In particular, appeals by objectors benefit the process of class action litigation not only by identifying legal errors by the district court (*e.g.*, *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997)) but also by deterring collusive settlements. Finally, if objectors technically must intervene to appeal the approval of a settlement, then petitioner's motion to intervene was timely as a matter of law because he filed it as soon as he received a copy of the proposed settlement. The judgment below accordingly should be reversed.

1. The suit underlying this petition involves the ERISA-governed retirement plan for the staff of the Transportation Communications International Union. Petitioner was a full-time employee of the Union from 1963 until his retirement in 1983, at which time he began receiving retirement benefits under the Plan.

By virtue of a 1989 amendment, the Plan provided for a one-time, ten-percent cost of living adjustment ("COLA") effective five years after retirement. In early 1991, the Plan's trustees adopted a plan amendment ("the 1991 Amendment") to provide a more substantial COLA to offset the substantial reduction in retirees' effective benefits that had been caused by inflation. The 1991 Amendment provided that, every three years, beneficiaries would receive a COLA equivalent to the rate of inflation for that period, up to a maximum of ten percent per COLA ("the 1991 COLA").

Later in 1991, the Plan elected new trustees. Those trustees determined that the financial projections underlying the 1991 Amendment were incorrect, and in 1993 they eliminated the 1991 COLA for ail subsequent retirees. The trustees determined, however, that as to persons (such as petitioner) who had already retired and were receiving benefits under the 1991 Amendment, the COLA was an

"accrued" benefit that could not be eliminated through a plan amendment. See 29 U.S.C. § 1054(g)(1).

To recoup the costs of this accrued benefit to the Plan, the new trustees sued the old trustees, seeking damages for breach of fiduciary duties. The district court agreed that the old trustees had breached their fiduciary duties in approving the 1991 COLA based on faulty financial assumptions. The district court also initially agreed with the new trustees that the COLA was an accrued benefit for persons who had retired, see *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995), but subsequently reversed itself, see *Scardelletti* v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997). Petitioner was not a party to that litigation, and no party had any interest in appealing from the district court's decision as a result of a subsequent settlement.

2. In response to the district court's decision reversing itself, the new trustees unilaterally eliminated the 1991 COLA for all past and future retirees. Petitioner's retirement benefits were reduced by approximately forty percent as a result. To confirm their right to eliminate the COLA, the new trustees instituted this litigation, leading to the settlement that petitioner seeks to appeal. Petitioner is a member of the defendant class. Respondents are the plaintiffs – the plan trustees – and the named defendants – the class representatives.[1]

a. To confirm their right to eliminate the 1991 COLA, the new trustees brought this defendant class action in the District of Maryland against all participants and beneficiaries of the plan, approximately 700 persons in total. The district court subsequently divided the defendant class into subclasses of retired plan beneficiaries and active plan participants. Because class certification was not sought pursuant to Rule

[1] Throughout the case, the Union has paid the attorney's fees of the class representatives. The settlement provides that the Plan will reimburse the Union for those costs.

23(b)(3), the individual class members were prohibited from opting out.

Petitioner is a member of the retiree subclass. He is also the president of the Retired Employees Protective Association ("REPA"), a group composed of a majority of Union retirees, more than four hundred persons in all, which seeks to preserve the retirees' benefits under the plan. The new trustees originally named petitioner as a defendant and a class representative, but he declined to serve in that capacity. The trustees subsequently named a new class representative as a defendant in their suit.

The plaintiff trustees subsequently reached a proposed settlement with the class representatives. The details of the settlement are not relevant here, but in broad outline it abrogates the 1991 Amendment and essentially eliminates the 1991 COLA for the retirees for the future. The settlement thus has a very substantial negative financial effect on approximately 400 retirees such as petitioner, drastically reducing the retirement benefits that they had been receiving.

The district court conditionally certified the case to permit the settlement to be preliminarily approved and, pursuant to Fed. R. Civ. P. 23(e), distributed to the class members to submit objections. J.A. 30-33. Respondents subsequently submitted the settlement and notice, which the court approved. *Id.* 47-55, 76-79.

The district court's order provides that "[m]embers of the Class may object to the proposed settlement" by submitting all objections in advance of the fairness hearing. J.A. 78. Furthermore, "[a]ny member of the Class who does not make his or her objection or opposition to the proposed settlement in the manner provided herein shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters." *Id.* 79.

The class notice advises each class member in its first sentence that their "rights may be affected by this class action litigation" (J.A. 54 (capitalization omitted)) and subsequently acknowledges that "members of the Retiree Subclass have an interest in restoring and maintaining the 1991 COLA." The notice further specifies that class members have the "right . . . to present [their] views to the court" (*id.* 50) and that "the Court must examine the terms of this settlement and consider any objections to the settlement that may be made by any member of the Class" (*id.*). It advises each class member that "you may enter a legal appearance individually or through your own counsel at your expense." *Id.* 51-52. "Any member of the Class who does not enter an appearance through counsel in the Action will be represented by counsel for his or her Subclass." *Id.* 52.

The class notice (which, as noted, was drafted by respondents and approved by the district court) also specifically contemplated that class members could appeal the entry of the settlement. "[I]f an appeal is filed, the settlement will remain contingent until all appellate proceedings are concluded. Therefore, if an appeal is taken, it may be several months before the settlement becomes final, assuming the appellate court also approves the settlement." J.A. 51.

b. Promptly upon learning the terms of the proposed settlement, petitioner formally moved to intervene in the case. J.A. 56-71.[2] Petitioner styled his motion to intervene as a "Cross-Motion" to respondents' motion for preliminary approval of the settlement. As a party intervenor, petitioner sought to oppose the settlement, as well as to take discovery, secure an injunction against eliminating the 1991 COLA, and disqualify the class counsel. The trustees opposed the motion

[2] Petitioner moved to intervene approximately two weeks after the settlement was submitted to the district court for preliminary approval – well before notice of the settlement was provided to the class and far in advance of the deadline for filing objections.

as it pertained to petitioner's objections to the settlement on the ground that he should "raise any objections to the proposed settlement agreement at the fairness hearing" in the manner specified by the class notice. J.A. 80. The trustees thus asserted that intervention should be denied because,

> *[m]ost importantly*, as a member of the Retiree Class, Mr. Devlin will have a full opportunity to raise all of his concerns about the settlement agreement, the negotiations, and the adequacy of the class representatives at the fairness hearing on November 12, 1999, prior to any approval of the proposed settlement. Intervention is not required to achieve that end. Because intervention is *wholly unnecessary* to allow Mr. Devlin to raise *any factual or legal issues concerning the settlement* and because of the substantial delay and likely prejudice that would otherwise result, the Trustees respectfully urge the Court to deny Mr. Devlin's motion to intervene.

J.A. 92 (emphases added).[3] The trustees also maintained that the class representatives were entirely adequate, necessarily precluding intervention as a matter of right. *Id.* 86-90.

The district court denied petitioner's motion to intervene. Pet. App. B1. Because petitioner therefore lacked status as a named party, the district court also denied as moot his motions for discovery, for an injunction, and to disqualify. *Id.*

c. Petitioner separately filed timely objections to the settlement on behalf of himself individually and also on

[3] Although the trustees argued that petitioner should have moved to intervene at an earlier date because he was personally aware that settlement discussions were ongoing, they also argued that no class member could intervene once respondents had "signed a settlement and a fairness hearing on the settlement has been scheduled," because at that point "[i]t is simply too late in the proceedings to intervene without undoing [that] progress." J.A. 84.

behalf of REPA. J.A. 104-16. Petitioner argued, for example, that the settlement was unlawful because (as the new trustees had *themselves* maintained in their prior suit against the old trustees) the 1991 COLA was in fact an accrued benefit under ERISA for pre-1991 retirees. Based on the district court's earlier, unappealed ruling to the contrary, respondents disagreed.

Petitioner also maintained that the district court should not approve the settlement because it was unfair. In petitioner's view, the plan could afford to maintain the COLA at least in part by requiring active employees to make pension contributions, just as petitioner had done for many years before the plan became entirely employer funded. Respondents disagreed, arguing that the retirees had already recouped the value of their individual contributions. Respondents also argued that the settlement fairly reflected the risks to all parties in litigating the case to judgment.

The district court agreed with respondents and rejected petitioner's objections to the settlement. The district court advised petitioner's counsel, "if I'm wrong [in rejecting petitioner's objections], you got an appeal." J.A. 154; see also C.A. Supp. App. 1240 ("I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course."). The court accordingly entered a final judgment approving the settlement. Pet. App. C1-C3.[4]

3. The trustee respondents subsequently invoked the final judgment to seek an injunction (enforced upon threat of contempt sanctions) prohibiting class members from making any court filing in any other jurisdiction that related to the subject matter of the settlement. According to the trustees,

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[4] The final judgment was delayed while the parties modified the settlement to accommodate the objections of a class member that the settlement was unfair as applied to him individually. See J.A. 15-17 (Nos. 115, 118, 124).

"[a]ll those attacks [on the settlement] really belong, if anywhere, here and in the Fourth Circuit." C.A. Supp. App. 897 (injunction hearing). The basis for the injunction was that each class member was bound to the settlement as a matter of res judicata. The district court agreed and enjoined all class members "from making any filing in any forum against any person * * * that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." J.A. 170-71.

4. On petitioner's appeal from the district court's final judgment, a panel of the Fourth Circuit held (i) that the district court properly denied petitioner's motion to intervene and denied as moot petitioner's further motions that depended on his status as a formal party, and (ii) that petitioner lacked standing to appeal the district court's approval of the settlement.

a. The Fourth Circuit did not doubt that petitioner had the right to appeal the district court's denial of his motion to intervene, notwithstanding that petitioner was not a named party in the district court. Rather, the Fourth Circuit held that the district court properly refused to permit petitioner to intervene on the ground that his motion was untimely. Pet. App. A10 ("Under either Rule 24(a) or 24(b), the application for intervention must be timely."). Permitting petitioner to intervene at the conclusion of settlement negotiations, the court concluded, "would have likely resulted in further delay and substantial additional litigation." *Id.* A12. On that basis, the court of appeals also affirmed the district court's denial of petitioner's motions for discovery, for an injunction, and to disqualify, all of which depended on petitioner's status as a named party. *Id.* A13 n.11.

b. The panel divided on the distinct question whether petitioner nonetheless could appeal the district court's approval of the *settlement* over his objections. The majority

held that petitioner lacked standing and therefore refused to reach the merits of his appeal. The panel majority concluded that "the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute 'spoilers' who were not entitled to intervene below might unduly delay class settlement on appeal." *Id.* A21. The majority "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representative and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Id.*

The panel majority rejected, however, the view of some circuits that objectors' standing is precluded on the basis of this Court's three-paragraph per curiam opinion in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), which states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled," and that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* involved only an attempt to appeal a class action judgment by persons who were neither named parties nor even class members. The majority below therefore agreed with the Second and Third Circuits that *Marino* is properly distinguished because it "did not involve members of a class action who were objecting to a class settlement." Pet. App. A16 n.12.

c. Judge Michael would have adopted what he regarded as the "better reasoned precedent hold[ing] that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." Pet. App. A30 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (CA2 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (CA3 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977); 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE, § 1797 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can

attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment.")).

Judge Michael explained that the right of an objecting class member to appeal dates to early equity practice and is furthermore supported by constitutional and practical considerations. Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). Because a class action settlement affects the rights of all class members, a rule refusing to permit non-named class members to appeal raises due process concerns. *Id.* Under the majority's approach, class members will be largely unable to protect their interests because they generally do not learn of their interest in intervening until provided with notice of the proposed settlement by the district court, by which point (under the panel majority's holding) it is too late to intervene and thereby preserve their right to appeal. *Id.* A33-A34.

Judge Michael also maintained that the majority's approach undermines district courts' administration of class actions. The prospect that objectors may appeal provides an important check on collusive settlements by the class representatives and their counsel. Pet. App. A32. Moreover, if prohibited from appealing, objectors will be more likely to opt out from the class or to institute collateral attacks on settlement orders. *Id.* A33 (citing *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (CA5 1988) (unnamed class members may "challenge the adequacy of class representation * * * by filing a separate lawsuit for that purpose")). Alternatively, district courts will be burdened with unnecessary motions to intervene, while courts of appeals, in turn, will be burdened by interlocutory appeals if intervention is denied. *Id.* A34. Conversely, as demonstrated by the experience of other circuits, there is no substantial risk that objectors will file meritless appeals of settlements, doubtless because in all but the most meritorious cases "the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a

settlement after considering the objector's concerns." *Id.* A32.

d. The Fourth Circuit separately addressed petitioner's appeal from the district court's injunction against class members making any court filing in any other jurisdiction that relates to the subject matter of the settlement. The injunction rested on the fact that the entire class was bound by the settlement as a matter of res judicata. Notwithstanding the court of appeals' holding that objectors could not appeal the settlement, it nonetheless held that they could properly be enjoined from acting in derogation of it. Pet. App. A29. Rejecting petitioner's substantive challenges to the injunction, the court simply remanded the injunction for the district court to reenter it in the form required by Fed. R. Civ. P. 65. *Id.* On remand, the district court reinstated the injunction. J.A. 174-77.

SUMMARY OF ARGUMENT

Neither respondents nor any of the courts of appeals dispute that objectors meet the settled statutory and constitutional requirements for appealing. A district court's approval of a settlement is an appealable "final decision" for purposes of the appellate jurisdiction statute. Class members furthermore have Article III standing to appeal the district court's judgment because they have a direct and personal interest in the outcome of the case that would be remedied by a favorable ruling on appeal. Unlike derivative shareholders, that interest is entirely personal to the appealing class member. Accordingly, objectors could be denied the right to appeal only if (i) they do not satisfy the general rule that only "parties" may appeal, or (ii) some special restriction on appealability (not embodied in the governing statutes or rules) could and should be announced. Neither of those assertions can be sustained under this Court's precedents and sound principles of judicial administration.

Most courts that deny standing to objectors rely on the rule that only "parties" may appeal. That reasoning is flawed, however, because this Court's precedents settle that the right to appeal extends to all parties *to the judgment* as opposed to merely *named* parties. Under those precedents, the relevant question is not whether the appellant is individually, as opposed to categorically, identified in the caption of the complaint, but rather whether the appellant is directly bound by the ruling from which he appeals. The same conclusion follows from this Court's precedents holding that "quasi-parties" and even certain "nonparties" may appeal. All members of a class, once certified, are bound by the court's judgment, and therefore are entitled to appeal if they have filed objections and thus preserved the arguments they seek to raise. The absence of a class certification procedure under Rule 23.1 again distinguishes class actions under Rule 23 from appeals brought by objecting derivative shareholders.

The policy reasons offered by the Fourth Circuit for nonetheless denying objecting class members the right to appeal cannot abrogate the basic statutory right to appeal and, in any event, are unpersuasive. When class members pursue their objections to a settlement on appeal, they do not in any sense "usurp" the role of the class representative. The representative has no right to preclude objections; to the contrary, Rule 23(e) guarantees every class member the right to present any objection to a settlement. Furthermore, appeals by objectors identify legal errors in orders approving settlements and deter collusive settlements.

Although the court of appeals held that objectors could preserve their right to appeal by intervening, this Court has squarely rejected that reasoning in closely related circumstances on the ground that it would undermine orderly class action proceedings. In any event, if intervention *is* required, the district court erred in refusing to permit petitioner to intervene limited to the right to contest and subsequently appeal the settlement.

ARGUMENT

I. OBJECTORS SATISFY EVERY REQUIREMENT FOR APPEALING ESTABLISHED BY STATUTE, RULE, AND THE CONSTITUTION.

While disagreeing over whether non-intervening class members are "parties" for the purpose of any rule that only parties can appeal, the litigants in this case, and all of the courts of appeals, necessarily *agree* that class members who have objected to a settlement and who are bound by the judgment satisfy all of the other requirements for an appeal as of right under the governing statute and rules, as well as under Article III of the Constitution.

The district court's approval of a class action settlement is appealable because it is embodied in a "final judgment" that terminates the case on the merits. See Pet. App. C1-C2 ("Final Order"; "This action is dismissed with prejudice."); 28 U.S.C. § 1291 ("The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."). The Federal Rules of Appellate Procedure, in turn, are coextensive with the statute's jurisdictional grant. See Fed. R. App. P. 1(b) ("These rules do not extend or limit the jurisdiction of the courts of appeals.").

An objecting class member's appeal of the settlement also presents a cognizable "case or controversy" for purposes of Article III of the Constitution. The class member asserts that the settlement did not provide him all the relief he seeks and to which he is entitled under the law. The class member thus presents a claim that he suffered an "actual" invasion of a "legally protected interest" that is "concrete and particularized," that is "fairly traceable" to the settlement being challenged, and that is "likely * * * [to] be redressed by a favorable decision" on his objections. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 598-61 (1992) (citations and

quotation marks omitted). Indeed, as Judge Easterbrook, in his most recent opinion on the subject, has recognized:

> Although several decisions (again *Scardelletti* is a good example) discuss the problem as if the question were whether class members have "standing" to appeal, we do not think that this is apt. Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?

In re Navigant Consulting, Inc., Secur. Litig., -- F.3d --, 2001 WL 1646846, at *-- (CA7 Dec. 26, 2001).

In this respect, there is arguably a distinction between the unquestionably direct personal interest of objecting class members under Rule 23 and the indirect interest pursued by objecting derivative shareholders under Rule 23.1. The *Felzen* respondents argued in this Court that derivative shareholders pursue only the direct interests of the corporation, as opposed to their own direct personal interests, contrasting derivative suits with actions in which shareholders sue to recoup the lost value of their shares. The *Felzen* respondents thus essentially retreated to the position that, although unnamed class members under Rule 23 *do* have the right to appeal, derivative shareholders lack a sufficiently direct personal interest to pursue an appeal. See, *e.g.*, No. 97-1732, Oral Arg. Trans. at 37.

Notwithstanding the absence of any plausible objection under the applicable statute, rules, and the Constitution, some circuits refuse to hear appeals by objecting, but non-intervening, class members on two bases: (1) That they are not "parties"; and (2) that policy considerations disfavor such appeals. Neither of those grounds is persuasive. Objectors are "parties" for purposes of the general rule that only "parties" may appeal from a final decision. Furthermore, objectors' right to appeal is consistent with sound principles of judicial administration and, in any event, there is no basis

for adopting a special restriction on appealability nowhere embodied in the governing statutes or rules.

II. Objecting Class Members Are "Parties" Having the Right to Appeal.

A. The Term "Parties" Encompasses All Persons Directly Bound by a Judgment, Not Merely the Named Representatives Acting as Agents for Multiple Individuals.

One justification offered for denying non-intervening class members the right to appeal a class settlement order is the general rule that only "parties" are permitted to appeal. Although the Fourth Circuit in this case seemed to reject that view, see Pet. App. A15-A16 n.12, the issue bears discussing because the "party" requirement is the only formal rule that could conceivably be argued to preclude petitioner's appeal. If petitioner is indeed a "party," or if the rule is not so formal as some circuits might suggest, then the preclusion of petitioner's appeal rests entirely on an exercise in judicial policy making untethered from any restrictions imposed by statute, rule, or the Constitution, which cannot overcome an otherwise clear right to appeal.

In *Marino* v. *Ortiz*, this Court stated in its per curiam opinion that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." 484 U.S. at 304. Some cases extrapolate from this general rule to the proposition that, because unnamed class members are, by definition, not individually named in the caption of the case, they are not "parties" entitled to appeal a final decision. *E.g.*, *In re Navigant*, -- F.3d at --, 2001 WL 1646846, at *-- ("members of a class (other than the named representatives) are not automatically parties"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (CA7 1997) (appellant class members "are not named plaintiffs"); cf. *Felzen* v. *Andreas*, 134 F.3d 873, 874-75 (CA7) (discussing view that unnamed shareholders in derivative suits are nonparties), *aff'd by equally divided Court*, 525 U.S. 315 (1999). The flaw in this reasoning is that it begs the question of who is a "party" for purposes of the right to appeal.

Under this Court's settled precedents, "party" status for purposes of the right to appeal is not limited to individually identified or "*named*" parties to a case, as some courts assume.[5] Instead, appellate "party" status extends to all persons over whom a district court exercises jurisdiction, who are directly bound by a final order or judgment of that court, and hence who are "parties" to the particular final decision from which they appeal. Thus, in the case cited by *Marino* for the proposition that only parties may appeal, *United States ex rel. Louisiana* v. *Jack*, the settled rule was described as precluding appeals from a judgment by a person "'who is not a party or privy to the record'" and that "'one who is not a party to a record and judgment is not entitled to appeal therefrom.'" 244 U.S. 397, 402 (1917) (quoting *Bayard* v.

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[5] Furthermore, it is a somewhat inaccurate usage to say that an objecting member of a properly certified class is not a "named" party in the case. While petitioner is not *individually* named in the caption of the case, he is certainly "named" categorically through the description of the class on whose behalf the individual representative purports to act. If that description is sufficient to identify petitioner for purposes of exercising jurisdiction over him and binding him by the resulting judgment, then it should be sufficient to "name" him as a party for purposes of Federal Rule of Appellate Procedure 3(c). Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988) ("The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants."; use of generic designation "*et al.*" would "leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment * * *."); *National Center for Immigrants' Rights* v. *INS*, 892 F.2d 814, 816 (CA9 1989) ("*Torres* does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them.").

Lombard, 50 U.S. (9 How.) 530, 551 (1850); *In Re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911) (per curiam)).

The precise scope of the term "party" for purposes of appeal was succinctly described in *Hinckley* v. *Gilman, Clinton, & Springfield R.R. Co.*, 94 U.S. (4 Otto) 467 (1876), in which this Court allowed an appeal by a receiver charged with distributing the proceeds of a foreclosure action, but who was not involved in or a party to the underlying litigation. This Court defined the receiver's appellate rights and party status according to the authority exercised by the lower court and the scope of the judgment or order being appealed:

> The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. *To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees*. He has, therefore, the corresponding right to contend against all claims made against him. *For this purpose he occupies the position of a party to the suit*, although an officer of the court, and after the final decree below has the right to his appeal here.

94 U.S. (4 Otto) at 469 (emphasis added); see also *Indiana Southern R. Co.* v. *Liverpool, London & Globe Ins. Co.*, 109 U.S. 168, 173 (1883) (person seeking to appeal from a decree in a suit to which he was denied intervention was "not a party *to the decree* from which he appeals" (emphasis added)).

In the present case, of course, petitioner is undeniably a "party to the decree from which he appeals" because the settlement order expressly acts upon a certified class of persons that includes petitioner. That order also plainly adjudicates petitioner's individual rights, as confirmed by the injunction entered against him on the basis of the settlement order. Furthermore, petitioner is also a party to the "record" as it relates to the order approving the settlement. He entered

his objections on the record and appeared before the court to advance those objections. And he did so not as a matter of grace, but as a matter of *right*, pursuant to Rule 23(e).[6]

Mere citation to *Marino*'s general rule that only "parties" may appeal thus ultimately begs the question of whether non-intervening class members bound by a judgment are *already* "parties" for such purpose. An analysis of the actual facts and holding in *Marino*, however, strongly supports the proposition that class members who are bound by a court's judgment *are* parties for purposes of appealing that judgment.

Marino was a class action brought by minority police officers alleging that the New York Police Department's sergeant's examination was discriminatory. Class representatives and the Police Department reached a settlement, and at the final fairness hearing a group of white police officers, *who were not class members and who had not sought to intervene*, appeared and presented their objections to the settlement. The district court nonetheless approved the settlement, and the group of white officers appealed. The Second Circuit affirmed, not on the merits, but on the ground that the appellants were not parties to the action.

This Court affirmed, per curiam, applying the "well settled" principle "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino*, 484 U.S. at 304. Responding to the Second Circuit's suggestion that there might be some exception to this general principle, the Court noted that "the better practice is for such

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[6] The right to object on the record and appear in defense of those objections is tantamount to a *per se* grant of limited intervention for the purposes of challenging a settlement. Having exercised that right, petitioner became a party to the record, and upon entry of the final order certifying the class and disposing of his claims, he became a party to the judgment as well. That he may or may not have been a "party" to other aspects of the proceedings is entirely irrelevant when he only seeks appeal from the final decision to which he *was* a party.

a *nonparty* to seek intervention for purposes of appeal." *Id.* (emphasis added).

Marino, however, emphasized that the appellants were not class members, had not intervened, and hence were effectively strangers to the proceedings. See 484 U.S. at 303 (contrasting depiction of the black and Hispanic *plaintiff class members* with the *non-party* white officers). The strong implication of that emphasis and distinction is that had the appellants in fact been class members, intervention would have been unnecessary. Thus, if anything, *Marino* supports the view that objecting class members are already "parties" who need not also intervene to appeal from approval of a class action settlement.

That "party" status for purposes of appeal is a function of being *bound* by a judgment or order, rather than a function of being individually named in the caption of a case, can be seen from a variety of circumstances in which appeals are uniformly allowed. Two general lines of precedents illustrate the point. In both, the appellants were not named plaintiffs or defendants but nonetheless participated in the district court and were bound by a ruling of the court. It would be profoundly inconsistent with those precedents to hold that unnamed plaintiffs and defendants to a judgment who similarly participate in the case may not appeal despite their direct personal stake in the outcome.

First, this Court has long recognized the right to appeal of "quasi-parties" – *viz.*, persons who, like petitioner, are not individually named as formal parties to the litigation but (i) have a direct stake in the outcome, (ii) have a recognized right to participate in the case, and (iii) do in fact participate. For example, in *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), Blossom had requested that the district court complete a foreclosure sale in which he had bid on the property, but the district court refused. When Blossom subsequently sought to appeal that ruling, the respondents objected that he was not a formal party to the case. This

Court answered the question "[i]s the appellant so far a party to the original suit that he can appeal" in the affirmative, explaining that Blossom was entitled to appeal with respect to that part of the case in which he had properly participated. The Court found it clear that Blossom could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid." 68 U.S. (1 Wall.) at 655. But the Court found it equally "well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect." *Id.* at 655-56. The Court cited as examples appeals by "[s]ureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment," all of whom "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court." *Id.*

Subsequently, this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court but had not formally intervened. *Williams* v. *Morgan*, 111 U.S. 684 (1884). The Court cited *Blossom* and its progeny as sustaining quasi-parties' right "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." 111 U.S. at 699.[7] The Court

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[7] *Blossom*'s progeny include *Hovey* v. *McDonald*, 109 U.S. 150, 155-56 (1883) (when non-party receiver received order in his favor, appeal could be brought against him); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1882) (trustees may appeal award in favor of complainant suing on behalf of a trust fund); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1878) (quasi-parties interested in order confirming a sale may appeal); *Hinckley* v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467, 469 (1877) (non-party

accordingly concluded that the objectors "had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700.[8]

Second, this Court has explicitly held, and the circuits have uniformly recognized, that certain "*nonparties*" to the case may nonetheless appeal various orders applicable to them. Such holdings recognize that, for purposes of appeal, those persons are "parties" to the final decision from which they appeal notwithstanding that they did not participate as named parties to the litigation. One example is *Marino*'s explicit recognition that "denials of [motions to intervene] are, of course, appealable." 484 U.S. at 304. Other examples include: appeals from contempt orders, *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned."); appeals from orders imposing attorney sanctions, *Rogers* v. *National Union Fire Ins. Co. of Pittsburgh*, 864 F.2d 557, 559-60 (CA7 1988) ("When a district court sanctions attorneys the attorneys are the real parties in interest, and the attorneys must appeal in their own names. A notice of appeal naming the party (in this case the plaintiffs) as the appellant, not the attorneys, does not create jurisdiction over the attorneys' appeal. Because the notice of appeal does not name [the attorneys] as the parties taking this appeal, we have no jurisdiction over their appeal." (citations omitted)); and

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receiver may appeal order directing him to pay money); and *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (appeal may be brought against persons who were "nominal parties" but not formal parties to the judgment).

[8] Even if this Court were to conclude that petitioner was not a "party" for purposes of the right to appeal, he would be entitled to appeal under the "quasi-party" line of decisions.

appeals from orders limiting attorney's fees, *Bowling* v. *Pfizer, Inc.*, 102 F.3d 777, 779 (CA6 1996) (class counsel and various other law firms appeal as "separate parties" from district court orders relating to fee award).

The Seventh Circuit's view that class members are not automatically parties because they are not counted towards the jurisdictional requirement of "complete" diversity in suits raising state-law claims (*In re Navigant*, -- F.3d at --, 2001 WL 1646846, at *--.) is incorrect The diversity jurisdiction statute does not refer to "parties" but rather requires that the suit be "between . . . citizens of different States." 28 U.S.C. § 1332(a). This Court settled in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 365 (1921), that the residency of unnamed class members is irrelevant *not* because they are not "parties" but because they are similarly situated to intervenors, who are not considered for purposes of diversity jurisdiction. 255 U.S. at 363-66. This Court has since described the import of *Ben-Hur* as requiring that "no nondiverse members are *named* parties." *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969) (emphasis added).[9]

At bottom, the Seventh Circuit's reasoning confuses "party" status under Fed. R. App. P. 3 with the wholly separate question of whether any given person is included in the diversity analysis. The two issues are simply not coextensive. There are instances in which persons who are indisputably "parties" for purposes of appeal are not counted towards the complete diversity requirement, and there are likewise instances in which persons with only an indirect relation to the litigation *are* counted in the diversity analysis.

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[9] This explanation of *Ben-Hur* is fully consistent with another of this Court's precedents that makes clear that absent class members are parties to the litigation: *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), in which the Court held that the claims of non-named plaintiffs, like those of named plaintiffs, must meet the requisite jurisdictional amount in diversity cases under 28 U.S.C. § 1332.

Compare *Ben-Hur*, 255 U.S. at 365 (citing *Stewart* v. *Dunham*, 115 U.S. 61, 64 (1885), for the proposition that citizenship of intervenors is not counted for diversity), with 28 U.S.C. § 1332(c)(1) (citizenship of nonparty insureds counted for diversity).[10] Because class members are not actually brought into the case until the class is certified, see *infra* at 24-28, and hence well after jurisdiction over the *case* has attached, their status as non-diverse "parties" would have no impact on existing diversity jurisdiction. *Ben-Hur*, 255 U.S. at 366 ("intervention of [non-diverse] citizens in the suit would not have defeated the jurisdiction already acquired").[11]

B. Once the Class Is Certified, Objectors Are "Parties to the Judgment," and Therefore Have the Right to Appeal.

When a district court certifies a class action pursuant to Rule 23 and resolves the case by entering a final judgment approving a settlement, each class member is a "party" to the judgment. The class representative holds that title not merely because his claims are "representative" – *i.e.*, typical – of the other class members, but because he affirmatively "represents" the class members who are parties bound by the court's ruling without personally participating in the litigation on an ongoing basis. Long ago, this Court adopted the

[10] The fact that unnamed class members are "parties" for purposes of the right to appeal is fully consistent with the rule that only the residency of the class representatives is relevant to the determination of diversity jurisdiction.

[11] The Tenth Circuit has implicitly rejected the view that objectors are not "parties"; while that court generally agrees with the Seventh Circuit that objectors may not appeal, it does permit objectors to appeal orders awarding *attorney's fees*. *Rosenbaum* v. *MacAllister*, 64 F.3d 1439, 1442-43 (1995). That limited right of appeal makes no sense under a theory that objectors are not parties. If objectors are not permitted to appeal the approval of the settlement itself, there is no basis for nonetheless permitting them to appeal a collateral ruling that less directly affects their interests.

English rule that a court of equity could permit "a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Smith* v. *Swormstedt*, 57 U.S. 288, 303 (1850). Under current practice, "'[A]ll members of the class, whether of a plaintiff or a defendant class, are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) (quoting 2 NEWBERG, CLASS ACTIONS § 2755, at 1224 (1977), and citing *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984)).[12]

As this Court's precedents consistently recognize, an unnamed class member who is bound by the judgment is therefore not a "nonparty." To the contrary, the entire point of class actions is that "[i]t is manifest that to require *all the parties* to be brought upon the record * * * would amount to a denial of justice." *Swormstedt*, 57 U.S. at 303 (emphasis added). Thus, this Court's leading precedents on the binding effect of class action judgments explain that "[t]he *absent parties* would be bound by the decree so long as the *named parties* adequately represented the absent class and the prosecution of the litigation was within the common interest." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808 (1985) (emphasis added) (discussing reasoning of *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940)).

The critical stage of the proceeding for triggering objectors' right to appeal is class certification. Once the class is certified (and, in (b)(3) class actions, class members are given the opportunity to opt out), class members "are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are *full*

[12] As noted *supra* at 5, because this class action was not certified under subsection (b)(3), petitioner and other objectors had no opportunity to opt out.

members who must abide by the final judgment, whether favorable or adverse." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 549 (1974). See also, *e.g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 836 (1999) (describing unnamed class members as "absent parties"); *Hansberry*, 311 U.S. at 42 (same).[13]

This Court's precedents addressing mootness issues in the context of class actions similarly support the conclusion that every class member is a "party" in a properly certified class action. In *Sosna* v. *Iowa*, 419 U.S. 393 (1975), for example, this Court held that when a class representative's individual claim is mooted on appeal, a live case or controversy remains in light of the claims of the remaining class members. "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the] appellant [class representative]." 419 U.S. at 399. In an accompanying footnote, the Court reasoned that class certification has "important consequences" because "[i]f the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of the certification to be members of the class." *Id.* at 399 n.8. It is only the fact that some parties to the case retain a continuing interest that precludes mootness despite the elimination of any personal interest on the part of the class representative.

The Court has consistently adhered to the principle that members of a properly certified class have a concrete interest in the litigation independent of that of the representative. Compare *Franks* v. *Bowman*, 424 U.S. 747 (1976) (applying *Sosna* to hold Title VII class action not moot notwithstanding that named plaintiff no longer had viable claim), and *United*

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[13] The absence of a class certification procedure under Rule 23.1 is yet another respect in which Rule 23 class actions are distinct from derivative suits.

States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) (extending *Sosna* to hold claim not moot even in absence of certified class because claim was "capable of repetition, yet evading review") with *Kremens* v. *Bartley*, 431 U.S. 119 (1977) (holding *Sosna* inapplicable when intervening developments seriously called class certification into question), and *Board of School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975) (per curiam) (holding *Sosna* inapplicable when no class action was properly certified).

This case illustrates perfectly that the right to appeal is not limited to "named parties." If petitioner is not a "party" with the right to appeal the settlement, he similarly could not appeal the district court's denial of his motion to intervene or the district court's entry of an injunction against him. But neither respondents nor the court of appeals even attempts to take that untenable position.

If petitioner *does* have the right to appeal the denial of his intervention motion and the injunction – as he must – that must be because the rulings directly affected petitioner and were binding upon him. Party status for purposes of appeal thus is measured by reference to the specific final judgment or order from which the appeal is taken, not by reference to the case caption or to the case as a whole. A person whose rights were adjudicated by a particular final ruling – be that ruling a denial of a motion or the final disposition of the case – is a party to that ruling and thus meets all of the formal requirements for appealing from that ruling as a "party * * * taking the appeal."

The same logic that allows petitioner to appeal from the denial of intervention or the entry of an injunction against him thus establishes that he may appeal the entry of the settlement over his objection. The plan trustees brought this lawsuit *precisely* for the purpose of resolving their obligations *vis-à-vis* all the plan members, each of whom was defined as a member of the mandatory class. The trustees and the class representatives then jointly sought class certification for the

purpose of settling the case and binding each class member to the court's judgment. Petitioner properly presented his objections to the settlement to the district court, which rejected them. The judgment, moreover, binds petitioner (as respondents and the district court invoked in entering an injunction against petitioner from acting in contravention of the settlement). The court's final judgment approves a substantial reduction in petitioner's pension and furthermore extinguishes petitioner's personal right to sue the plan to reinstate his benefits and to challenge the trustees' actions through litigation.[14]

There accordingly can be no reasonable dispute that petitioner is thus a party to the judgment, and his formal objections to the settlement – submitted on the record and as of right under Rule 23(e) – make him a party for purposes of appealing that judgment based on those objections.

III. The Fourth Circuit's Rationale for Denying Unnamed Class Members the Right to Appeal Is Flawed.

The Fourth Circuit held that objectors lack "standing" to appeal a class action settlement not due to any formal defect in status, but rather because of its view that such appeals

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[14] That the Federal Rules of Civil Procedure recognize objectors as "parties" is also implicit in the fact that absent class members are often allowed discovery into the justification for a class settlement, precisely because of their undisputed interest in the litigation. 2 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992); see, *e.g.*, *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (CA7), *cert. denied*, 444 U.S. 870 (1979). Since, under the Federal Rules of Civil Procedure, discovery may be obtained only by parties to the action, or those expecting to become parties, Fed. R. Civ. P. 27, it is clear that the courts view absent class members as parties for discovery purposes. *See* Fed. R. Civ. P. 26(b)(1) ("*[p]arties* may obtain discovery" regarding relevant, non-privileged matters), Fed. R. Civ. P. 33 ("*any party* may serve upon any other party written interrogatories"), Fed. R. Civ. P. 34 ("*[a]ny party* may serve upon any other party" document requests).

would undermine orderly class action litigation as a policy matter. As we explain *infra*, the court of appeals was mistaken in its policy analysis. But at the outset, there was no warrant for the Fourth Circuit to impose its own policy-based restriction on appeals "as of right" that lacks any basis in statute, rules, or the Constitution (see *supra* Part I) or in this Court's precedents recognizing the traditional rule that appeals are generally limited to "parties" (see *supra* Part II).

No doubt, class actions – like all suits – could be made more "efficient" if fewer appeals were allowed or if the right to object were eliminated altogether. But the appropriate means of balancing efficiency against fairness concerns is through legislation or the established procedures for revising the Federal Rules of Civil and Appellate Procedure, subject to due process constraints. Cf. *Ortiz*, 527 U.S. at 861 ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

A. An Objector's Appeal Does Not Usurp the Role of the Class Representative.

Contrary to the view of the majority below, an objector's appeal of the approval of a class action settlement does not "usurp" the prerogatives of the class representative, for the simple reason that Congress has not granted the representative the power independently to settle the case or to prevent other class members from appealing. Throughout much of the case, the representative acts as the champion of the absent class members and thus has extensive authority to act in their interests with respect to matters such as discovery and the course of trial litigation. The adversarial posture of the case provides assurance that the interests of absent class members will be protected. Class members therefore have no *per se* right to object to the course of the litigation except by asserting that the representative is not acting in the interests of

the class or by moving to intervene in the ongoing conduct of the case.

By contrast, when the representative enters into a proposed settlement with the opposing party and urges the district court to approve the settlement, "the procedural protections built into the Rule to protect the rights of absent class members during litigation" are essentially absent. *Ortiz*, 527 U.S. at 847. Rule 23(e) therefore provides that no settlement may be approved "without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

The protections provided by Rule 23(e) are critical. As this Court explained in *Amchem*, "The inquiry appropriate under Rule 23(e) * * * protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.'" 521 U.S. at 623 (quoting 7A Wright *et al.* at 518-19). As the Second and Third Circuits have recognized, "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan* v. *Rand*, 192 F.3d 60, 67 (CA2 1999) (quoting *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (CA3 1993)).

The Fourth Circuit failed to recognize this important limit on the class representative's power and thus failed to recognize that the representative has no more authority to prevent a settlement from being challenged on appeal than to prevent objections from being presented in the first place. To the contrary, once the settlement is approved, concerns that the class representatives are no longer acting adverse to the opposing parties (and thus are less responsive to the interests of other class members) are even greater. At least in the district court, the class representatives and opposing parties

have some incentive to accommodate objections in order to secure approval of the settlement. But once the district court enters an order approving the settlement, the class representative unquestionably will not pursue an appeal on behalf of the objectors.

Nor do objectors "usurp" the role of the class representatives when they appeal. Rather, after a settlement is reached, the interests of the class representatives and the objecting class members necessarily diverge and the representative effectively ceases to pursue the interests of the objectors. In the court of appeals, the objector proceeds in his individual capacity rather than as a representative of the class as a whole and he has no obligation to pursue any interest other than his own.[15] Straightforward examples include appeals by objectors challenging the application of a settlement to their unique circumstances (cf. *supra* at 8 n.4 (discussing objections of individual class member)) or challenging the district court's refusal to permit them to opt out (*e.g.*, *Adams* v. *Robertson*, 520 US 83 (1997)) or to include them within the class (*e.g.*, *Berger* v. *Iron Workers Reinforced Rodmen*, 170 F.3d 1111 (CADC 1999)). The Fourth Circuit's rule, however, prohibits objectors from pursuing even these wholly individual interests on appeal.

In other instances, the objector's argument on appeal will have broader application. That was true in *Amchem*, in which the objector successfully raised an array of challenges to a settlement class action. It is also true in this case. But the fact that a settlement will likely be invalidated if an objector prevails on an argument of general applicability to the class does not mean that the objector is improperly acting as the class "representative." The objector is simply pursuing his individual interest on appeal just as he did in the district court,

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[15] The appeal thus would not proceed if the appealing objector withdrew it (unless another objector were permitted to intervene on appeal and take his place).

where the settlement would have been similarly invalidated if the district judge had agreed with the objection. That result is merely the consequence of the principle of judgments that "any objection [of a class member] sustained would inure to the benefit of all." *Mullane*, 339 U.S. at 319.

B. Appeals by Objectors Further Sound Principles of Judicial Administration And Preserve Objectors' Due Process Rights.

The majority below similarly erred in asserting that objector appeals would undermine "effective class management." Pet. App. A21. As already noted, a class member has an absolute right to present objections to the settlement under Rule 23(e) and thus to challenge the class representative's management of a particular aspect of the case – *viz.*, settlement. But the adversarial procedure of objectors and the class representative does not *undermine* effective class management; it *is* effective class management because it is essential that settlements affecting absent class members be subjected to adversarial testing. There is no reason to believe that "effective class management" would be undermined if the identical objections were considered by the court of appeals. It is therefore not surprising that neither respondents nor the Fourth Circuit identified any evidence that adverse effects had arisen in the several circuits that permit objector appeals.

Nor is there any merit to the argument that appeals by objectors should be prohibited in order to speed the disposition of the case. That argument proves too much, for it improperly elevates finality above the error-correcting function of the appellate courts and would justify eliminating *all* appeals from any judgment or order in any case. As Judge Easterbrook has recognized in concluding that intervention must be freely granted to objectors for the purpose of appeal, the "possibility that [the appellate court] would see merit to their appeal cannot be called 'prejudice'; appellate correction

of a district court's errors is a benefit to the class." *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (CA7 2000).[16]

If anything, a rule permitting objectors to appeal enhances the integrity and efficacy of class action proceedings. Rule 23(e) guarantees class members notice and an opportunity to be heard, in part, because objections advise the district court of potential flaws in the settlement and furthermore deter collusive settlements. While class actions can be enormously useful tools for the efficient provision of justice, they have substantial and well-recognized dangers. See *Weinberger* v. *Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (CA1 1991) ("[Class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."). Permitting objections to be pursued on appeal provides an additional layer of deterrence against self-dealing by the class representatives and their lawyers. In particular, the attorneys negotiating the settlement will be more attentive to the interests of the entire class if they know that objections will receive a thorough review, including on appeal if necessary.

The dynamics of the settlement process in the district court generally tend to undermine the effectiveness of

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[16] Restricting appellate review of class actions will also create an incentive to abuse the procedure at the outset. When a class is not sufficiently "numerous" to satisfy Rule 23, the action may be permitted to proceed only if each individual is formally joined as a named party. Fed. R. Civ. P. 19. In that circumstance, the joined parties will frequently be represented by a single counsel who handles the course of litigation. But there can be no serious argument denying that each of the joined parties has an independent right to appeal an adverse judgment. The only result of holding that a similarly situated class action objector – effectively a party joined categorically rather than by name, and represented by joint counsel – nonetheless may not appeal would be to encourage the use of class actions as a tool to eliminate the rights of objectors rather than as a tool to *protect* the interests of class members by reducing the burden of litigation.

existing safeguards against problematic settlements. Once a class action settlement is reached, the district court's first action is usually to grant "preliminary approval," which is a finding – almost always untested by adversarial presentation – that the settlement contains no obvious substantive or procedural defects. MANUAL ON COMPLEX LITIGATION THIRD, § 30.41, at 237 (Federal Judicial Center 1995) ("MANUAL").[17] After preliminary approval, the proponents of the settlement expend a considerable sum notifying the class of the settlement. Thereafter, the same district judge who preliminarily approved the settlement presides over a "fairness hearing" and decides whether to give final approval under Rule 23(e). See *id.* §§ 30.41-.42. Given the initial blessing of the district court, the expense of mounting objections, and the complexity of many settlements, the settlement may rightly be viewed by class members as a "fait accompli." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (CA7 1987).

Not surprisingly, the presentation of an unchallenged proposed settlement to a district court therefore can create a hydraulic pressure for approval, a fact apparent from data showing that fairness hearings in district courts tend to be brief and generally do not result in changes to settlements crafted by the class representative and opposing parties. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995) (empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF

[17] In almost all cases, potential objectors are not even aware of the preliminary hearing because they have yet to receive notice of a settlement. Indeed, in settlement class actions such as *Amchem*, in which settlement and certification are simultaneous, at the time of the preliminary hearing the class members have no idea that a lawsuit even exists.

CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991).

The prospect of appellate review of judgments approving class action settlements (like the prospect of appellate review in *every* case) also causes the district judge to be fully attentive to the objections before him. A principal value of the appeals process is that it "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). Moreover, appeals correct errors. Decisions such as *Amchem* – which reached this Court only because the Third Circuit permits objectors to appeal – demonstrate that there is a substantial role for the appellate courts to play in evaluating class action settlements.

Finally, any doubt must be resolved in favor of permitting class members to appeal because it would be inconsistent with due process to limit an objector's recourse to a "likely futile objection at the fairness hearing required by Rule 23(e)." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C.D. L. REV. 805, 822 (1977), *quoted in Ortiz*, 527 U.S. at 850 n.27. This Court's decision in *Shutts* settled that "before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation.'" *Ortiz*, 527 U.S. at 848 (quoting *Shutts*, 472 U.S. at 812); see

also *Mullane*, 339 U.S. at 314 (class action procedures must "afford [class members] an opportunity to present their objections"); cf. *Matsushita*, 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) (writing separately to "stress" applicability of procedural due process protections for absent parties in class actions, "emphatically including those resolved by settlement"). Due process concerns are only heightened when, as in this case, objectors are not permitted to opt out: "The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class." *Ortiz*, 527 U.S. at 846.[18]

C. Requiring Prophylactic Intervention in the District Court Poses a Greater Threat to Class Management than Does a Right to Appeal Based on Objections under Rule 23(e).

If anything, it is the Fourth Circuit's holding that objectors have the right to appeal only if they *intervene* that has the greatest potential to undermine orderly class management. Rather than channel class-member participation through the Rule 23(e) procedures, as the district court sought to do in this case, the Fourth Circuit's approach encourages widespread participation throughout the proceedings.[19] Class members who would not otherwise move to intervene will do so protectively because they cannot know *ex ante* if (i) the case will be settled, (ii) what the

[18] The settlement also implicates the class member's Seventh Amendment right to pursue his claim to a jury trial. Cf. *Ortiz*, 527 U.S. at 846 ("By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.").

[19] Once admitted by the district court as named parties, intervenor-objectors will presumably feel the need to voice all potential objections at every step of the proceeding out of a concern that silence will be deemed acquiescence or waiver.

settlement might provide, (iii) if they will have an objection to the settlement, (iv) whether the named parties will accommodate their objection, (v) whether the course of the litigation will demonstrate that the opposing party has a strong case, such that the settlement ought to be accepted notwithstanding its flaws, or (vi) if not, whether the district judge will sustain the objection. And if district courts instead deny such protective motions to intervene, then the courts of appeals will be burdened with interlocutory appeals of denials of those motions. See *supra* at 11.

Rule 23 was designed precisely to avoid numerous individuals becoming deeply involved in the litigation as named parties, as this Court settled in rejecting an intervention requirement in the closely analogous circumstances of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *American Pipe* held that the pendency of a class action tolls the statute of limitations for putative class members in the event class certification is later denied. In reaching that holding, the Court specifically rejected the defendant's principal argument the statute should be tolled only if the putative class members intervened to become individually named parties.

If an intervention requirement were adopted, the Court explained, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." 414 U.S. at 553. This result "would frustrate the principal function of a class suit" because litigation over motions to intervene would give rise to "precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases in which a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* at 551 (quoting Fed. R. Civ. P. 23(b)(3)). The Court has subsequently reiterated the rationale of *American Pipe* that, if intervention were required, "members of a class would have an incentive to protect their interests by intervening in the

class action as named plaintiffs prior to the decision on class certification" – a "needless duplication of motions" that would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Chardon* v. *Fumero Soto*, 462 U.S. 650, 659 (1983).

Moreover, if (as the Fourth Circuit held in this case) an intervention requirement is anything other than *pro forma*, it will not protect the interests of objectors because the district court may simply deny the intervention motion. As this Court explained in holding that a putative class member who files a separate action rather than eventually intervening is entitled to the tolling doctrine of *American Pipe*, "permission to intervene might be refused for reasons wholly unrelated to the merits of the claim": "Putative class members frequently are not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), and permissive intervention under Federal Rule of Civil Procedure 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 & n.4 (1983). That is, of course, precisely what happened in this case, in which the district court denied petitioner's motion to intervene (which he filed *immediately* upon learning of the settlement) as untimely because he knew of his interest in the litigation at an earlier date.

An intervention requirement would amount to no more than a trap for the unwary. When a class action is settled, notice is sent out to class members (frequently numbering in the thousands) who, in the main, *are not represented by counsel* and are left to their own devices to ascertain their rights. The notice informs the class members of the nature of the litigation, the terms of the settlement, and where and when they must file their objections. MANUAL, § 30.41, at 237. Thus, even if we assume that a class member represented by counsel should know of the need to intervene (quite a stretch given the large number of reported decisions showing

otherwise), imposing that requirement on a *pro se* objector is at odds with reality. A layperson will not be aware of the niceties of federal procedure under Rule 24, and, thus, to condition the right to appeal on such knowledge would be illogical and unfair.

Even if objectors understand their rights, an intervention requirement would impose substantial unwarranted burdens. Potential intervenors must file a motion to intervene, along with a "complaint in intervention," setting out the claims that they believe are not being adequately advanced by the named plaintiffs, or a defensive pleading "setting forth the * * * defense for which intervention is sought." Fed. R. Civ. P. 24(c). Assuming the motion is granted, intervenors also often must file mandatory disclosures and are subject to discovery. Throughout the litigation, they will be forced to incur substantial fees and costs.[20]

Alternatively, uncertainty regarding the availability of an appeal may encourage class members to institute collateral attacks on the judgment or (in (b)(3) class actions) opt out. Indeed, one appellate decision has asserted that the availability of collateral attack is a viable alternative to appeal, and thus supports an intervention requirement. *Guthrie* v. *Evans*, 815 F.2d 626, 628 (CA11 1987). But that approach ought not be the rule, for it is unfair to class members and is far more destructive to finality than is the availability of direct appeal on the merits of any objections.

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[20] Cf. *Shutts*, 472 U.S. at 813 (declining to require that class action plaintiffs "opt in" because "[t]he plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution," particularly given the number of class members "'who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step'" (quoting Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1967)).

Furthermore, while such collateral attacks should be disfavored because they create uncertainty regarding the validity of the settlement, they do not provide the benefits of appeals from orders approving settlements because collateral attacks are essentially limited to the assertion that the class representative was inadequate. See generally Kahan & Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 780 & n.69 (1998) (hailing superiority of comprehensive direct review over collateral attack and criticizing intervention requirement as potential impediment to appellate review). Regardless of the scope of the collateral attack, the better rule would be to permit challenges to a class action settlement to be heard in the original forum, with direct appellate review, rather than to encourage each class member to file a separate suit, in a distant forum, challenging the *res judicata* effect of a previously entered class action judgment. Rule 23 was amended in 1966 to eliminate "[a] recurrent source of abuse under the former Rule": "the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *American Pipe*, 414 U.S. at 547.

An intervention requirement is also unwarranted because that procedural hurdle would produce no benefit to class action litigation. By definition, absent class members must hold the same claims as the named plaintiffs. See *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, .56 (1982); see also Fed. R. Civ. P. 23(a)(2), (3). Because objectors challenge the settlement of a previously filed complaint, it would make no sense to require them to file their own "complaint in intervention" or any other pleading seeking to impose liability on the adverse party. Because the adversity of interests between settlement supporters and settlement objectors is clear and irreparable, the drafters of Rule 23 could not have contemplated that objectors would be

put through the Rule 24 process as a matter of course in order to preserve their right to appeal.

This case illustrates perfectly that the Fourth Circuit's rule requiring intervention will only make class action litigation less efficient. In this appeal, petitioner seeks only to pursue his objections to the *settlement* – for example, that it unlawfully eliminated an accrued benefit to the retiree subclass and that it unfairly failed to retain the COLA by requiring current employees to make pension contributions, just as retirees such as petitioner had done in the past. If petitioner had been permitted to intervene as a full participant in the case, he could have pursued not merely those issues but also his requests for discovery, for an injunction, and to disqualify the class counsel. And, of course, if the district court had denied those requests, petitioner would have had the right to appeal.

IV. IF INTERVENTION IS REQUIRED, IT SHOULD BE FREELY GRANTED AND DEEMED SUFFICIENT FOR PURPOSES OF APPEAL IF AT LEAST SOUGHT SOON AFTER THE DENIAL OF OBJECTIONS.

If this Court *does* hold that a class member must intervene in order to appeal, the judgment nonetheless must be reversed. In *United Airlines* v. *MacDonald*, 432 U.S. 385 (1977), the district court denied class certification and subsequently ruled for the named plaintiffs on the merits. Because certification had been denied, the putative class members were not "parties" bound by the judgment with the right to appeal. They accordingly moved to intervene in order to appeal the certification ruling. This Court held that putative class members' motion to intervene was "timely" under Rule 24 as a matter of law since they "acted promptly after the entry of final judgment." 432 U.S. at 396.

The Court specifically rejected the defendant's argument that the class members were required to intervene earlier in

the case. Such a requirement, the Court explained, "would serve no purpose": "Intervention at that time would only have made the respondent a superfluous spectator in the litigation for nearly three years, for the denial of class certification was not appealable until after final judgment." 432 U.S. at 395 n.15. Citing *American Pipe*, the Court continued: "such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. The result would be the very 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.*

On the reasoning of *United Airlines*, petitioner was *a fortiori* entitled to appeal because he formally sought to intervene promptly upon receiving a copy of the proposed settlement, well before the proposal was even distributed to the class and well before his Rule 23(e) objections were rejected by the court. The Fourth Circuit's holding that petitioner was required to intervene earlier in order to preserve his right to appeal the settlement makes no sense – and invites a deluge of protective intervention motions – because the named parties had not even reached a settlement at that point. And, even if the district court believed that full participation as an intervenor would have been unduly disruptive, under the logic of *United Airlines*, the district court could have granted petitioner limited intervention rights. The court did not do so, however, only because it already believed that petitioner had the right to appeal as an objector. See *supra* at 8. Indeed, respondents themselves led the district court to reach that conclusion when they proposed a class notice that explicitly contemplated appeals by objectors and subsequently when they successfully opposed petitioner's intervention on the ground that he had the full right to contest the settlement as an objector. See *supra* at 6-7.

* * * *

There is no reasonable dispute that class action objectors have a sufficient interest in the district court's judgment approving a settlement to take an appeal. The Fourth Circuit's holding that objectors nonetheless must intervene to appeal is unsound. The district court may refuse to permit intervention. If, on the other hand, the intervention requirement is deemed *pro forma*, it serves no purpose at all and promises to be merely a burdensome trap for the unwary.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

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No. 01-417

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IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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42 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. PETITIONER'S "PARTY WITH A RIGHT TO APPEAL" ARGUMENTS	9
A. Party Status	10
B. Petitioner's "Party Directly Bound By The Judgment" Theory	14
C. Petitioner's "Party To The Case" Theory	25
II. PETITIONER'S POLICY ARGUMENTS	28
III. PETITIONER'S INTERVENTION ARGUMENT	33
CONCLUSION	37

TABLE OF AUTHORITIES

CASES — Page

Blossom v. Milwaukee Railroad, 68 U.S. (1 Wall.) 655 (1863) ..... *passim*
Crawford v. Equifax Payment Service, Inc., 201 F.3d 877 (7th Cir. 2000) 32
Croyden Associate v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992)..... 26
Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998), *aff'd by equally divided court sub nom., California Pub. Employees Retirement Sys. v. Felzen*, 525 U.S. 315 (1999). 26
Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) 23
Hansberry v. Lee, 311 U.S. 32 (1940) ..... *passim*
Hinckley v. Gilman, Clinton, & Springfield Railroad Co., 94 U.S. 467 (1876)..... 12, 13
Hovey v. McDonald, 109 U.S. 150 (1883)..... 13
Indianapolis Sch. Comm'rs v. Jacobs, 420 U.S. 128 (1975)..... 21
Johnson v. Manhattan Railway Co., 289 U.S. 479 (1933)..... 13, 14
Karcher v. May, 484 U.S. 72 (1987)..... *passim*
Kremens v. Bartley, 431 U.S. 119 (1977)..... 20, 21
Marino v. Ortiz, 484 U.S. 301 (1988)..... *passim*
Martin v. Wilks, 490 U.S. 755 (1989)..... 17, 19
Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996)..... 18, 19
Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609 (1865) 12, 13
In re Navigant Consulting, Inc. Securities Litigation, 275 F.3d 616 (7th Cir. 2001)..... 29
New York v. Reebok Int'l Ltd., 96 F.3d 44 (2d Cir. 1996) 24

TABLE OF AUTHORITIES—Continued

Page

Office & Prof'l Employees Int'l Union, Local 2 v. FDIC, 962 F.2d 63 (D.C. Cir. 1992)..... 24
Owasso Independent School District v. Falvo, 534 U.S. ____, 122 S. Ct. 934 (2002)..... 35
Pennoyer v. Neff, 95 U.S. 714 (1878)..... 19
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)..... 18, 19
Richards v. Jefferson County, 517 U.S. 793 (1996)..... *passim*
Sage v. Railroad, 96 U.S. 712 (1878)..... 13
Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp.2d 942 (E.D. Tex. 2000)..... 31
Singleton v. Wulff, 428 U.S. 106 (1976) 25
Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853)..... 18, 19
Sosna v. Iowa, 419 U.S. 393 (1975) 20, 21
In re Synthroid Marketing Litigation, 264 F.3d 712 (7th Cir. 2001)..... 32-33
Toyota Motor Manufacturing, Inc. v. Williams, 534 U.S. ____, 122 S. Ct. 681 (2002)..... 35
Trustees v. Greenough, 105 U.S. 527 (1882) 13
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)..... 30
United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988)..... 12
Williams v. Morgan, 111 U.S. 684 (1884)..... 13
Yee v. City of Escondido, 503 U.S. 519 (1992)..... 36

STATUTES AND RULES

Fed. R. Civ. P. 23..... *passim*
Fed. R. Civ. P. 23(a) 14
Fed. R. Civ. P. 23(c)(4)..... 10

TABLE OF AUTHORITIES—Continued

	Page
Fed. R. Civ. P. 23(d)	27
Fed. R. Civ. P. 23(e)	8, 26, 27, 33
Fed. R. Civ. P. 24	*passim*
Fed. R. Civ. P. 30(a)(1)	15
Fed. R. Civ. P. 31(a)(1)	15
Fed. R. Civ. P. 33(a)	15
Fed. R. Civ. P. 34(a)	15
Fed. R. Civ. P. 36(a)	15
Fed. R. Civ. P. 45(a)(3)	15
Fed. R. Civ. P. 56(a)	15
Fed. R. Civ. P. 56(b)	15
Fed. R. Civ. P. 56(e)	15
Sup. Ct. R. 14(1)(a)	35, 36
MISCELLANEOUS	
Advisory Committee Notes on Rule 24	30
Restatement (Second) of Judgments § 34(2) (1982)	16
Restatement (Second) of Judgments § 42 comment g (1982)	16
David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913 (1998)	22
15A Wright, Miller & Cooper, Federal Practice & Procedure, § 3902.1 (2d ed. 1991)	25
18 Wright, Miller & Cooper, Federal Practice & Procedure, §§ 4454-60 (2d ed. 1991)	24

BRIEF FOR RESPONDENTS

The Brief for the Petitioner sets out the opinions below, the basis for this Court's jurisdiction, and the statute involved. Pet. Br. at 1-2.

STATEMENT OF THE CASE

The *certiorari* petition in this case raises the following Question Presented:

> Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement? [Pet. i.]

That "right to appeal" question arises out of a declaratory judgment class action lawsuit by Robert A. Scardelletti, *et al.*, as trustees of the Transportation Communications International Union Staff Retirement Plan against George DeBarr and Anthony Santoro, Sr., individually and as representatives of two separate subclasses; the class action settlement therein; and the District Court's approval of that settlement. The Court of Appeals succinctly and accurately stated the nature of the underlying class action case and of the relevant proceedings in the District Court. In the first regard the Court of Appeals stated:

> The Transportation Communications International Union (TCU) is a labor union representing approximately 85,000 employees, mostly in the railroad and service industries. The Plan is a defined benefits pension plan that covers TCU's officers and employees. In October 1990, the former trustees recommended that the Plan be amended to add a COLA adjustment equal to the increase in the COLA index for every three years after a participant's retirement. As a result of the

amendment, which became effective on January 1, 1991, the existing retirees received increases in their pensions based upon the number of years they had been retired.

In late 1991, TCU elected new officers and selected the new trustees to replace the former trustees. In 1993, however, it was revealed that the former trustees had relied upon an incorrect valuation of the Plan's liabilities in deciding to enact the COLA amendment and that enactment of the COLA amendment had increased the Plan's liabilities by approximately $20 million. The new trustees believed that they could not rescind the COLA benefits across the board because, under ERISA, they were prohibited from amending the Plan to reduce accrued benefits. *See* 29 U.S.C.A. § 1054(g)(1) (providing that accrued benefits "may not be decreased by amendment of the plan"). Accordingly, they amended the Plan to "freeze the COLA as it pertain[ed] to the future service accrual for active employees," . . ., thereby "eliminating COLA increases based on future service under the Plan." . . . The amendment did not, however, eliminate the COLA benefits for participants who were retired as of January 1, 1991.

In January 1995, the new trustees filed suit against the former trustees in the United States District Court for the District of Maryland seeking damages and an equitable decree declaring the COLA amendment void as a product of fiduciary breaches. *See Scardelletti v. Bobo*, 897 F.Supp. 913 (D.Md. 1995); *Scardelletti v. Bobo*, No. JFM-95-52 (D.Md. Sept.8, 1997). The district court found in favor of the new trustees, agreeing that the former trustees had breached their fiduciary duties. The district court also concluded that the 1991 COLA benefit was not an accrued benefit for pre-1991 retirees such as Devlin because it had not been received prior to their

retirement.[6] In accordance with the district court's decision, the new trustees amended the Plan and rescinded the COLA for participants who had retired prior to January 1, 1991 (the 1997 amendment).

---

[6] The district court originally concluded that the COLA benefit was an accrued benefit for pre 1991 retirees. *See Scardelletti v. Bobo*, 897 F. Supp. 913, 916 (D.Md. 1995). As noted above, accrued benefits generally cannot be eliminated by amendments to the plan. *See* 29 U.S.C.A. § 1054(g)(1). The district court, with little elaboration and presumably relying upon § 1054(g), stated that "[u]nfortunately, the current trustees are caught between a rock and a hard place to remedy this situation because ERISA prohibits amendments of the Plan repealing an automatic COLA." *Bobo*, 897 F. Supp. at 916. It later reconsidered, however, stating that "if an employee works with the expectation that she is earning, and will receive, a pension benefit, an employer may not later decide not to give her the benefit that it has promised and she has earned. In the present case, Plan participants who retired prior to 1991 did not work with the expectation that they would receive a COLA. Thus, the COLA was not an accrued benefit." *See Scardelletti v. Bobo*, No. JFM-95-52, at 18-19 (D.Md. Sept.8, 1997).

[Pet. App. A4-A6 (citations and other footnotes omitted).]

With regard to the proceedings in the class action case, the Court of Appeals added:

> On October 14, 1997, the new trustees filed the present action as a class action in anticipation of challenges to the 1997 amendment, seeking a declaration that the 1997 amendment was binding on all Plan participants or, in the alternative, that the 1991 COLA amendment was void as to all participants. The new trustees' original complaint named Devlin as a class representative for the Retiree Subclass because he previously had been active in challenging the new trustees' efforts to eliminate the COLA benefits. Devlin, however, refused to accept the position. The new trustees, therefore, named a new representative for the Retiree Subclass, Anthony Santoro.

On February 9, 1999, the [D]istrict [C]ourt for the District of Maryland conditionally certified the class pursuant to Federal Rule of Civil Procedure 23(b)(1) and divided it into two subclasses: those who would benefit from the removal of COLA (the Active Subclass), and those who would benefit from the retention of COLA (the Retiree Subclass). In May 1999, with the assistance of a magistrate judge, the new trustees and the class representatives agreed upon a settlement under which the COLA benefits would be eliminated in exchange for certain other benefits. Under the proposed settlement, it was agreed that the [D]istrict [C]ourt would enter a consent order declaring the 1991 COLA benefit void at its inception.

In the meantime, Devlin and four other retirees were pursuing actions in the Southern District of New York alleging claims under the ADEA and ERISA against TCU relating to their death benefits and medical benefits. They also included a claim relating to the 1997 Amendment, arguing that the 1997 Amendment was motivated by age discrimination. *See Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 126 (2d Cir. 1999). On April 13, 1999, the Second Circuit affirmed the Southern District of New York's dismissal of Devlin's COLA claim, stating that "[t]he exact COLA issue that the appellants are pursuing ... is being addressed by the district court in Maryland.... It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue . . . ."

Shortly after the Court of Appeals for the Second Circuit affirmed the dismissal of Devlin's challenge to the 1997 Amendment, Devlin became interested in the class action pending in the [D]istrict [C]ourt in Maryland. On April 20, 1999, Devlin's counsel sent a letter to the [D]istrict [C]ourt informally seeking to intervene in the class action. On May 12, 1999, Devlin sent another letter through counsel to the [D]istrict [C]ourt repeating his informal request to intervene and

informing the [D]istrict [C]ourt that Devlin was "still await[ing] a response from Your Honor." . . . For whatever reason, Devlin did not formally move to intervene, nor did he take any further action to follow up on these letters, until September 1999.

On August 27, 1999, the Trustees filed a motion for preliminary approval of the settlement in the District of Maryland. On September 10, 1999, Devlin finally sought leave to intervene pursuant to Federal Rule of Civil Procedure 24(a) and (b). At the November 12, 1999 fairness hearing, the [D]istrict [C]ourt denied Devlin's motion to intervene as "absolutely untimely." . . . It then examined the considerations leading to the settlement, heard Devlin's objections, and approved the settlement. [Pet. App. A7-A9 (citations and footnotes omitted).]

On appeal to the Fourth Circuit, Petitioner made two separate "right to appeal" arguments. Petitioner's first argument was "that he was entitled to intervene before the [D]istrict [C]ourt under Federal Rule of Civil Procedure 24(a) and (b) to challenge the settlement," Pet. App. A4, and "that the [D]istrict [C]ourt erred in denying his motion to intervene," *id.* A10. And, Petitioner's second argument was "that even if the [D]istrict [C]ourt properly denied his motion to intervene, he is nevertheless entitled to appeal from the [D]istrict [C]ourt's final order approving the settlement," *id.* A4, in that "he has standing to challenge the settlement by virtue of his objections at the fairness hearing and his unsuccessful attempt to intervene, *id.* A14.

The Fourth Circuit unanimously rejected Petitioner's appeal of the District Court order denying his motion to intervene. *See* Pet. App. A10-A14 (Part II of Court of Appeals' opinion), A30 (Michael, J., concurring in that Part II ruling). The Fourth Circuit then went on, by a 2-1 vote, to reject Petitioner's second argument—that his right to appeal could

be based solely on his status as an objector to the settlement. *See id.* A14-24 (Part III of Court of Appeals' opinion), A30-34 (Michael, J., dissenting from that Part III ruling).

SUMMARY OF ARGUMENT

In *Karcher v. May*, 484 U.S. 72 (1987), and *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court reaffirmed and applied the well-settled general rule that only parties have a right to appeal from an adverse final judgment. *Infra* pp. 9-10. Petitioner makes two arguments as to why he *is* a "party" for purposes of the *Karcher/Marino* "right to appeal" rule—both of which are wrong.

1. (a) At the most basic level, the persons who are the parties who litigate a federal court case are the named plaintiff(s), the named defendant(s), and the persons who become named parties by intervention, substitution, or third-party practice. Beyond that, federal court cases can generate ancillary legal disputes/ancillary proceedings in which a third person is the movant or the respondent and an adverse district court ruling runs against, and directly binds, that third person as an individual. In that situation, this Court has recognized in, *e.g.*, *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), that the third person movant/respondent in the ancillary proceeding who is subjected to an adverse final order/judgment in that proceeding is a party with a right to take an appeal therefrom. *Infra* pp. 10-14.

(b) Petitioner's main "party" theory—which invokes *Blossom v. Milwaukee Railroad, supra*, and the thin line of like cases in this Court—is that *every* individual member of a properly-certified class in a Rule 23 class action case is "a party directly bound by an adverse judgment" in the case with a right to appeal therefrom. But the *Blossom* rationale and result are of no aid to Petitioner.

On first principles of the law of judgments, the *only* individual members of a certified class who are "parties directly bound by the judgment" in a Rule 23 class action case are the named representative parties who appear—either originally or through intervention, substitution or third-party practice—to litigate the claim(s)/defense(s) set out in their complaint/answer. In contrast, as the Court most recently explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), there is a "general consensus 'in Anglo-American jurisprudence'" that persons—including the numerous persons who are members of a certified class in a Rule 23 class action—who have *not* appeared on their own behalf to litigate their own claim(s)/defense(s) are "'*not* bound by a judgment *in personam*.'" *Id.* at 798 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (emphasis added). Such persons are bound solely because, and to the extent that, they are members of a class that has been fairly and adequately represented by the named representative parties to the case. *Infra* pp. 14-18.

All of Petitioner's attempts to show otherwise through snippets of language drawn from various opinions of this Court in the class action context do nothing to put those principles into question. *Infra* pp. 18-22.

It is also to the point that Petitioner's theory—which transmutes a class action from one commenced and litigated in the district court by a representative party to one commenced and litigated in the court of appeals by as many of the represented class members as choose to take an appeal—is entirely inconsistent with, and destructive of, the very purpose of the Rule 23 process for the fair and effective litigation of class action cases. *Infra* pp. 22-24.

2. Petitioner's secondary "party" theory is that in a Rule 23 class action case those class members who make a timely objection to a proposed settlement are, on that basis, "parties to the case" with a right to appeal the judgment approving the settlement.

(a) This argument cannot be squared with this Court's holding in *Marino v. Ortiz, supra*, that persons who presented their objections to a proposed settlement of a Title VII class action case but did not intervene in the case "were *not* parties to the underlying [class action] lawsuit" with a right to appeal from the judgment approving the settlement. 484 U.S. at 304 (emphasis added). *Infra* pp. 25-26.

Petitioner fails in his attempt to distinguish *Marino* on the ground that class members who present objections to a proposed class action settlement do so "as a matter of *right*, pursuant to Rule 23(e)," whereas non-class-members (like the objectors in *Marino*) who present objections to such a settlement do so "as a matter of [judicial] grace." Pet. Br. at 19 (emphasis in original). There is nothing in Rule 23 (including the cited Rule 23(e)), or in any other Federal Rule, providing that class members who present objections to a proposed settlement of a class action case become "parties to the case," but that other objectors do not. *Infra* pp. 26-27.

(b) Nor is there any substance to the suggestion, implicit in Petitioner's Question Presented, that even if a class member does *not* become a party to the case by making an objection to the approval of a class action settlement, a class member does become a party by making an objection *and* moving to intervene. *Infra* p. 28.

3. Petitioner's subtext is that without regard to whether objecting class members are parties on one or both of his "party" theories, there are sound policy reasons for allowing appeals by objecting class members from district court judgments approving class action settlements. This suggestion for re-writing the "right to appeal" rule is fundamentally unsound.

(a) The *Karcher/Marino* rule—and its corollary here that only third persons who have become parties to a class action through Rule 24 intervention have the right to appeal from a judgment approving a settlement of that action—has

the benefits of formal precision and a high degree of certainty that are particularly desirable in a rule of civil procedure; Petitioner's suggested policy standard does not. *Infra* pp. 28-29.

(b) Petitioner bottoms his policy argument on the proposition that the procedure for becoming a party to a class action case afforded those who object to a proposed settlement—a Rule 24 motion to intervene—is unduly burdensome. But that is not so. A Rule 24 intervention requirement imposes at most a minimal burden on objecting class members, as against the far greater burden on an appellant inherent in the taking of and prosecution of an appeal from the approval of a class action settlement. And, by any measure, the benefits of an intervention requirement in this context more than balances that minimal burden. *Infra* pp. 29-33.

4. Petitioner also seeks to raise the question of whether the District Court's denial of Petitioner's motion to intervene and the Court of Appeals' unanimous affirmance of that denial were in error. But that question is *not* the single question set out in the *certiorari* petition nor a question fairly included therein, and is therefore *not* a question before this Court. *Infra* pp. 33-36.

ARGUMENT

I. PETITIONER'S "PARTY WITH A RIGHT TO APPEAL" ARGUMENTS

In *Karcher v. May*, 484 U.S. 72, 77 (1987), the Court reaffirmed the "consistently applied . . . general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." And, in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court added:

> The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. *See, e.g., United States ex rel.*

Louisiana v. Jack, 244 U.S. 397, 402 (1917); Fed. Rule App. Proc. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal").

Petitioner makes two claims to a party status that supports a right to appeal the District Court judgment approving the class action settlement in this case.

First, and foremost, Petitioner argues that as a member of a certified class in this Rule 23 Fed. R. Civ. P. class action case, he is "a party directly bound by the judgment" approving the settlement with the right to appeal that judgment.

Second, Petitioner argues that as a class member who, on the publication of notice of the proposed settlement, made a timely objection to the settlement, he is, on that basis, "a party to the case" with the right to appeal the judgment approving the settlement.[1]

Neither of Petitioner's "party" theories is sound. Accordingly, under *Karcher* and *Marino*, Petitioner has no right to appeal from the District Court judgment in this case.

A. Party Status

At the most basic level, the persons who are parties to a federal court case are:

(i) the named plaintiff(s) who initiate the lawsuit through a complaint, and who are entitled to pursue the claim(s) stated therein in the manner provided in the Federal Rules;

(ii) the named defendant(s) who are properly served with the complaint, and who are entitled to state and maintain defense(s) to the plaintiff(s)' claim(s) in the manner provided for in the Federal Rules; and

[1] To simplify the terminology used here, the "subclass" of retirees of which Petitioner is a member will be referred to (as in Petitioner's brief) as a "class." *See* Fed. R. Civ. P. 23(c)(4).

(iii) "[o]ne who is not an original party to [the] lawsuit," but who, in the manner provided for in the Federal Rules, "become[s] a party by intervention, substitution, or third-party practice," *Karcher*, 484 U.S. at 77, and who is entitled to pursue her legal position in the manner provided for in the Federal Rules.

To the foregoing, Petitioner would add:

> Under this Court's settled precedents, "party" status for purposes of the right to appeal is not limited to individually identified or "*named*" parties to a case, as some courts assume. Instead, appellate "party" status extends to all persons over whom a district court exercises jurisdiction, who are directly bound by a final order or judgment of that court, and hence who are "parties" to the particular final decision from which they appeal. [Pet. Br. at 17 (emphasis in original) (footnote omitted).]

It is not intuitively obvious that the term "party" encompasses a person who is not a "'*named*' part[y] to a case." *Id.* (emphasis in original). But lawsuits between the named parties to a case can and do generate ancillary legal disputes/ancillary proceedings in which: (i) a third person is the movant or the respondent (like a named plaintiff/named defendant in the underlying lawsuit); and (ii) an adverse district court ruling runs against, and directly binds, that third person as an individual (like a dispositive ruling for/against a named party in the underlying lawsuit). And, in that situation, this Court has recognized that the third person (like a named party subject to an adverse final order/judgment) is a party with a right to take an appeal from the adverse final order/judgment in the ancillary proceeding that runs against and directly binds that person as an individual.[2] The Court has done so in the following cases:

[2] While we agree with Petitioner on the basic point of the cited cases, we disagree that those cases constitute "[t]wo general lines of precedents."

(i) *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), recognizing the right of a bidder on foreclosed-upon property—not a named party to the original foreclosure action—to appeal from the district court's order denying the bidder's petition claiming a legal entitlement to the property, *see* Pet. Br. at 20-21;

(ii) *Hinckley v. Gilman, Clinton, & Springfield Railroad Co.*, 94 U.S. 467 (1876), recognizing the right of a court-appointed receiver—not a named party to the original foreclosure action—to appeal from the district court's order requiring the receiver to pay money into the court registry, *see* Pet. Br. at 18; and

(iii) *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), recognizing the right of third person witnesses, not named parties to the case, to appeal from a contempt citation entered by the district court against the witnesses for noncompliance with subpoenas served upon them by a named party to the case, *see* Pet. Br. at 22.[3]

Pet. Br. at 20. Insofar as we can discern, there is a single line of cases stemming from *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863).

[3] Beyond the three cases noted in text, two of the cases Petitioner cites as *Blossom* "progeny," *see* Pet. Br. at 21 n.7, do rely on *Blossom*'s reasoning, albeit in treating not with an appellant's right to appeal but in rejecting an appellee's claim that because the appellee was not a named party to the underlying lawsuit no appeal will lie. *See Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (Rejecting the argument of an appellee bidder on foreclosed-upon property that an appeal from a district court judgment in the bidder's favor in an ancillary proceeding precipitated by the bidder arising out of an original foreclosure action did not lie because the bidder was not a named party to the original action. The bidder in *St. Paul* was a party to the ancillary proceeding resulting in a judgment in that bidder's *favor* just as the bidder in *Blossom* was a party to the ancillary proceeding resulting in a judgment *against* the bidder there); *Hovey v. McDonald*, 109 U.S. 150, 155-56 (1883) (Rejecting the argument of an appellee receiver that an appeal from a district court judgment in the receiver's favor in an ancillary proceeding arising out of an original foreclosure action did not lie because the receiver was not a named party to the original action. The receiver was a party to the ancillary proceeding resulting in a judgment in the receiver's *favor* just as the receiver in *Hinckley* was a party to the ancillary proceeding resulting in a judgment *against* the receiver there).

In our view, none of Petitioner's other cases is a *Blossom* "progeny." While Petitioner cites *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Sage v. Railroad*, 96 U.S. 712 (1878), *see* Pet. Br. at 21 n.7, neither is in point. *Trustees v. Greenough* does not even cite *Blossom*, and is part of "*Blossom*'s progeny," if at all, only to the extent that it follows *sub silentio* the Court's ruling on the altogether separate "finality" issue presented in *Blossom* (and not presented here). *Sage* does cite *Blossom*, but only on the "finality" issue, *see* 96 U.S. at 714, it being undisputed that the appellants before the Court "had been admitted as defendants in the suit" and as named parties were parties for purposes of the appeal, *id.* at 713.

Petitioner also cites *Williams* v. *Morgan*, 111 U.S. 684 (1884), which he describes as a case in which "this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court *but had not formally intervened.*" Pet. Br. at 21 (emphasis added). But that misdescribes *Williams*, which involved an appeal by two individuals who *had formally intervened* and were thus parties. *See* 111 U.S. at 696 ("As to the right of Williams and Thomason to appeal, this depends on their *right to intervene* . . . or rather on the power of the court to allow them to do so. . . . Williams and Thomas jointly, presented, as we have seen, formal applications to be heard before the master and the court. . . . The court very properly, as it seems to us, *granted their application.*") (emphasis added).

Johnson v. Manhattan Railway Co., 289 U.S. 479 (1933)—cited not by Petitioner but by one of his supporting *amici*, *see* Brief of *Amicus Curiae* Council of Institutional Investors at 25—is most fairly read as a decision noting a highly unusual variation on the *Williams* intervention theme. In a decision antedating the Federal Rules of Civil Procedure, the *Johnson* Court approved the dismissal of a second suit on preclusion grounds. In *dictum*, the Court opined that the shareholders who brought and/or intervened in the second suit in order to object to the conditions of a

Neither the holdings nor the reasoning of the decisions in this thin *Blossom* line of authority provides support for Petitioner's claim that he is a party with a right to appeal from the judgment here—as we now show.

B. Petitioner's "Party Directly Bound By The Judgment" Theory

Petitioner's main "party" theory—that in a Rule 23 class action case "members of a properly certified class . . . are 'parties' directly bound by the judgment" in the case, Pet. Br. at 2—is plainly and simply wrong.

The only class members who are parties to a Rule 23 class action case are those members of the class who "sue or [are] sued *as representative parties*," Fed. R. Civ. P. 23(a) (emphasis added), and those named representative parties are the only class members who are "parties directly bound by the judgment" in the case.[4] The additional numerous persons who are members of the class are *not* parties to the case and are *not* "parties directly bound by the judgment" in the case. This conclusion is buttressed by the Federal Rules, the theory of representative actions and the principles of *in personam* judgments.

1. The Federal Rules set the same basic terms for the conduct of Rule 23 class action cases as for other civil actions litigated in federal court. And, under the Federal Rules—as the Rules have long stood and currently stand—only those

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receivership imposed on their company in the first suit would have been entitled "to intervene as parties in the [first] suit" under former Equity Rule 37, and could have appealed in that suit if their objections had been denied. *See* 289 U.S. at 495-96. In the course of this brief discussion, the Court did not elaborate on the required intervention procedure.

[4] In addition, as we have indicated, a person is a party if that person has in the manner provided for in the Federal Rules been duly permitted to intervene or substitute as a named representative party, either for general purposes or for purposes of taking an appeal. *See also infra* pp. 29-33.

class members who "sue or [are] sued as representative parties" have the rights, spelled out in the Rules, to personally appear to litigate the claim(s)/defense(s) set out in their complaint/answer. For example, only the named representative parties, and not any of the other class members, have the right to take or obtain discovery in support of their asserted claim(s)/defense(s).[5] Likewise, only the named representative parties, and not any of the other class members, have the right to move for summary judgment in the case or to defend against a motion for summary judgment.[6]

Given that the named representative parties to a Rule 23 class action case are the only class members who appear to litigate the claim(s)/defense(s) set out in their complaint/answer, it necessarily follows that only those named

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[5] *See, e.g.*, Fed. R. Civ. P. 30(a)(1) ("A party may take the testimony of any person, including a party, by deposition."); Fed. R. Civ. P. 31(a)(1) ("A party may take the testimony of any person, including a party, by deposition upon written questions."); Fed. R. Civ. P. 33(a) ("[A]ny party may serve upon any other party written interrogatories"); Fed. R. Civ. P. 34(a) ("Any party may serve on any other party a request . . . [for] designated documents."); Fed. R. Civ. P. 36(a) ("A party may serve upon any other party a written request for . . . admission[s]."); Fed. R. Civ. P. 45(a)(3) ("The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service."). With respect to the *discretionary* decisions of some district courts to allow limited discovery by objectors to a proposed class action settlement who have not been accorded party status, see p. 27 n.14 *infra*.

[6] *See, e.g.*, Fed. R. Civ. P. 56(a) ("A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . move . . . for a summary judgment in the party's favor upon all or any part thereof."); Fed. R. Civ. P. 56(b) ("A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may . . . move . . . for a summary judgment in the party's favor as to all or any part thereof."); Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may . . . respon[d].").

representatives are "parties directly bound by the judgment" in the case disposing of those claims/defenses. The named representatives are the parties asserting or defending against a claim and it is the named representatives as parties who are bound by the judgment. *See* Restatement (Second) of Judgments § 34(2), at 345 (1982) ("A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party."). *See also id.* § 42 comment g, at 412 ("A person who appears in his own behalf in litigation has had his day in court and is bound by the judgment.").

In contrast, as the Court most recently explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), there is a "general consensus 'in Anglo-American jurisprudence'" that persons—including the numerous persons who are members of a certified class in a Rule 23 class action—who have *not* appeared on their own behalf to litigate their own claim(s)/defense(s) are "'*not* bound by a judgment *in personam*.'" *Id.* at 798 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (emphasis added).[7]

We hasten to add that the foregoing proposition—that only the named representative parties in a Rule 23 class action case are "parties directly bound by the judgment" in the case and that the many other individual class members are not so bound—most emphatically does *not* mean that the judgment does not extend to the certified class as a class entity or that the judgment has no preclusive effect on those other individual class members. But the preclusive effect on the individual class members derives from the status of those members as part of the class that is bound as the result of a judgment obtained by or against the named representative parties.

[7] *Richards* did not itself involve the binding effect of a judgment in a class action case, but in discussing the constitutional limits of preclusion, the Court discussed the nature of class actions at some length.

As *Richards* makes clear, the law of judgments "do[es] not always require one to have been a party to the judgment in order to be bound by it." 517 U.S. at 798. To the contrary, and "[m]ost notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Id.* To take the example pertinent here,

> as [the Court] explained in [*Martin v.*] *Wilks*[, 490 U.S. 755, 762 n.2 (1989)]: "We have recognized an exception to the general rule when, in certain limited circumstances, a person, *although not a party*, has his interests adequately represented by someone with the same interests who is a party. *See Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) ('class' or 'representative' suits); Fed. Rule Civ. Proc. 23 (same). . . ." [517 U.S. at 798-99 (emphasis added).]

It bears emphasis that the preclusive effect of an adverse judgment on persons who are parties thereto is not the same as its effect on persons who are in privity with the parties to the judgment. As we have shown, an adverse judgment in a Rule 23 class action case operates directly and automatically to extinguish the claim(s)/defense(s) of the named representative parties as "part[ies] to [the] judgment." *Richards*, 517 U.S. at 798. On the other hand, under the "privity" rule, the judgment extinguishes the claim(s)/defense(s) of the represented class members if, but only if, the class member, "'although not a party, has [had] his interests adequately represented by someone with the same interests who [was] a party.'" *Id.* (quoting *Wilks*, 490 U.S. at 762 n.2).

Indeed, as *Hansberry v. Lee* holds, where the named representative parties in a class action case do *not* adequately represent the interests of the other class members, it violates due process to accord an adverse judgment in that case *res judicata* effect against those other class members. *See* 311 U.S. at 42-43 ("[T]h[e] members of a class not present as parties to the litigation may be bound by the judgment,"

consistent with due process of law, only "where they are in fact adequately represented by parties who are present."). In that situation, then, the class action judgment does extinguish the named representative parties' claim(s)/defense(s), but does *not* extinguish the other class members' claim(s)/defense(s).

2. (a) In arguing that represented class members are "parties directly bound by the judgment" in the class action case, Petitioner places great albeit misplaced reliance on statements regarding the preclusive effect of class action judgments in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996); and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Pet. Br. at 24-26. Petitioner sums up its case discussion by quoting *Shutts* for the proposition that "'[t]he *absent parties* would be bound by the decree so long as the *named parties* adequately represented the absent class and the prosecution of the litigation was within the common interest.'" Pet. Br. at 25 (quoting 472 U.S. at 808) (emphasis by Petitioner).[8]

Petitioner's main "party" theory, however, does *not* rest on the proposition stated in *Hansberry v. Lee* and summarized in *Shutts* that the "privity" rule extends a judgment's preclusive effect to properly represented third persons who are *not* "parties directly bound by the judgment." Rather, the theory rests on the quite different proposition that all represented

[8] *See also* Pet. Br. at 24-25 (quoting *Smith v. Swormstedt*, 57 U.S. at 303, for the proposition that under "the English rule . . . a court of equity could permit 'a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the Court.'"); Pet. Br. at 25 (quoting *Matsushita*, 516 U.S. at 379, for the proposition that "[u]nder current practice, 'all members of the class, whether of a plaintiff or defendant-class, are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'").

class members *are* "parties directly bound by the judgment" in a class action case. *Richards*, *Wilks* and *Hansberry v. Lee* reject that quite different proposition in the clearest possible terms. And, nothing in *Smith v. Swormstedt*, *Matsushita*, *Shutts* or, so far as we are aware, any other decision of this Court, embraces it.

(b) Petitioner likewise fails in his effort to make something of the Court's references in *Shutts*, *Hansberry v. Lee*, and other decisions to represented class members in a class action case as "absent parties" or "parties in interest." *See* Pet. Br. at 25-26.

None of the cited decisions (nor any other decision of the Court that we have been able to find) refers to represented class members as "parties directly bound by the judgment" in a class action case, or suggests that an "absent party" to a class action case or a "party in interest" thereto is a "party directly bound by the judgment" in the case.

The *Hansberry v. Lee* opinion cuts squarely against any such equation. The opinion begins by denoting the petitioners as persons that the court below had held "bound by a judgment rendered in an earlier litigation *to which they were not parties*." 311 U.S. at 37 (emphasis added). And, the opinion goes on to state the "'class' or 'representative' suit" exception to the principle of *Pennoyer v. Neff*, 95 U.S. 714 (1878), to be that "the judgment in [the suit], to which some members of the class are parties, may bind members of the class or those represented *who were not made parties to it*." *Id.* at 40-41 (emphasis added).

Indeed, *Hansberry v. Lee*'s due process holding rests on the fundamental *distinction* in the law of judgments between: (i) named representative parties in a class action case who appear to litigate their claim(s)/defense(s) and who *are* "parties directly bound by the judgment," and (ii) represented class members who do not appear to litigate their own

claim(s)/defense(s) and who are bound by the judgment only as members of a class and only if their interests have been adequately represented by the named representative parties.

Against that background, the Court's references to "absent parties" or "parties in interest" are most fairly read as shorthand for "persons whose legal situation is such as to put them in privity with the named representative parties in a class action case so long as those named representative parties have adequately represented the absent class members' interests"—not as shorthand for "persons who are parties directly bound by the judgment in a class action case."

(c) Petitioner goes on to argue that "[t]his Court's precedents addressing mootness issues in the context of class actions similarly support the conclusion that every class member is a 'party' in a properly certified class action." Pet. Br. at 26. Petitioner cites in particular *Sosna v. Iowa*, 419 U.S. 393 (1975), and this Court's statement therein that "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the] appellant [class representative]." Pet. Br. at 26 (quoting 419 U.S. at 399) (brackets by Petitioner). Again, Petitioner's argument is without merit. The *Sosna* line of decisions lends added support to our position.

The *Sosna* Court did *not* state, or even imply, that *each individual person* who is a member of a certified class acquires a separate "legal status" upon class certification—much less *a "party" status*. To the contrary, what the *Sosna* Court said is that upon class certification "*the class of unnamed persons*" *as a class entity* acquires a separate "legal status." 419 U.S. at 399 (emphasis added). As the Court added in *Kremens v. Bartley*, 431 U.S. 119 (1977), under *Sosna* and its progeny "it is only a 'properly certified' *class* that may succeed to the adversary position of a named

representative whose claim becomes moot." *Id.* at 132-33 (emphasis added) (citing *Indianapolis Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975)).

Indeed, Petitioner's reading of *Sosna* would lead to absurd results that *Kremens v. Bartley* makes clear were not intended by the *Sosna* Court. Under Petitioner's reading, when the named representative party's individual claim in a certified class action case becomes moot, any one of the "unnamed persons" who is a member of the certified class with a live claim (or any number of those persons) is entitled to assume the role of the named representative party who litigates the claims therein, without any regard to whether that person is a proper named representative party who "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

Under *Kremens v. Bartley*, however, what is required in these circumstances in order to avoid a declaration of mootness of the class action case is the proper "substitution of class representatives with live claims." 431 U.S. at 135. Substitution of new class representative parties would be entirely unnecessary in this context, of course, if all "unnamed persons" who are members of the certified class were already "parties" with the litigation rights attendant to party status.[9]

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[9] Petitioner also relies, to no avail, upon the *Sosna* Court's statement that class certification has "important consequences" because "[i]f the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of the certification to be members of the class." Pet. Br. at 26 (quoting 419 U.S. at 399 n.8). This Court's precedents undoubtedly do "contemplate" that where the named representative party provides fair and adequate representation to the class the judgment in a class action case will be binding on all members of the certified class. But as we have shown, that is because of the rule making judgments in representative actions—including class

(d) Petitioner fares no better in his argument that "[t]he same logic" under which the Court of Appeals (without discussion or analysis) recognized Petitioner's right to appeal both "the [D]istrict [C]ourt's denial of his motion to intervene" and "the [D]istrict [C]ourt's entry of an injunction against him," supports Petitioner's right to appeal the District Court judgment approving the class action settlement. Pet. Br. at 27. In both the instances Petitioner cites, his appeal arose out of an ancillary proceeding in this Rule 23 class action case initiated by Petitioner as an individual, or brought against Petitioner as an individual, that generated a District Court ruling and final order that ran directly against, and directly bound, Petitioner as an individual.

In both instances, then, under *Blossom v. Milwaukee Railroad*, *supra*, Petitioner was "a party directly bound by the [final orders]" running against him, with a right to appeal therefrom. In contrast, as we have shown, neither Petitioner nor any of the other represented individual class members in this case is "a party directly bound by the judgment" approving the class action settlement here.[10]

3. The short of the matter is that Petitioner's "party directly bound by the judgment" theory has no basis in the law. And, while that is dispositive, it is worthy of note that Petitioner's theory—which transmutes a class action from one commenced and litigated in the district court by a representative party to one commenced and litigated in the

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actions—binding on properly represented third persons, and *not* because every member of a certified class is "a party directly bound by the judgment" in the class action case.

[10] As indicated above, represented class members are bound by a class action judgment only because, and to the extent that, they are members of a class that has been adequately represented by the named representative parties. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913 (1998) (developing this aspect of the nature of class actions).

court of appeals by as many of the represented class members as choose to take an appeal—is entirely inconsistent with, and destructive of, the very purpose of the Rule 23 process for the fair and effective litigation of class action cases. As the Eleventh Circuit aptly put it in *Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987):

> A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . A class cannot even be certified unless its members are so numerous that joinder is impracticable. Fed.R.Civ.P. 23(a)(1). If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits.[11]

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[11] Citing empirical data purporting to show a relative paucity of "objector appeals" from the approval of class action settlements during the 1971-2000 period, *Amicus Curiae* Council for Institutional Investors argues that the concerns stated by the *Guthrie* court are misplaced, and that "[i]n fact, mandating intervention would impose *more* work on the federal courts, not less." Brief of *Amicus Curiae* Council of Institutional Investors at 21 (emphasis in original). This argument suffers from several flaws.

First, Petitioner's "party directly bound by the judgment" theory would allow not only "objector appeals" from the approval of class action settlements, but also non-party-class-member appeals from adverse final judgments *in fully-adjudicated class action cases* (of which *Guthrie* itself was one). Thus, in offering empirical data on "objector appeals" from the approval of class action settlements, the Council of Institutional Investors has not even begun to come to grips with the manageability problems that likely would be created by acceptance of Petitioner's theory.

Second, whatever this empirical data may indicate on its own narrow terms with respect to the past (and we do not even know whether the data treats comprehensively with the whole range of reported and unreported judicial action in the settlement context), that data is an ineffective

Indeed, Petitioner's theory extends by necessary implication to various other forms of representative litigation that are as well-recognized and accepted in the law as is class action litigation, and that generate judgments that generally have the same preclusive effect on absent represented persons in privity with the named representative party as do judgments rendered in class action litigation: *e.g.*, litigation by a trustee on behalf of the beneficiaries of a trust, *see, e.g.*, *Richards*, *supra*, 517 U.S. at 798; litigation by a labor union or other unincorporated association on behalf of its members, *see, e.g.*, *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992); and *parens patriae* litigation by the government on behalf of its citizens, *see, e.g.*, *New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2d Cir. 1996). *See also generally* 18 Wright, Miller & Cooper, Federal Practice & Procedure, §§ 4454-60 (2d ed. 1991).

Petitioner's theory, then, is equally inconsistent with, and equally destructive of, the very purpose of these various other well-recognized forms of representative litigation.[12]

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harbinger of the future, as the class action is still in its formative stages with respect to a wide range of potential litigation. Indeed, the result in the case at bar may serve as a focal point in determining the future of the class action as an effective technique for the resolution of large-scale disputes.

Third, whatever burden is placed on the federal courts (and would-be intervenors) by a mandatory intervention requirement is more than offset by the benefits of that requirement, both in the settlement context, *see infra* pp. 29-33, and in the non-settlement context, *see Guthrie*.

[12] Showing obvious discomfort with the necessary implications of his theory, Petitioner suggests that—at least in the specific context of a class action case that is resolved by a district-court-approved settlement—"party" status for purposes of an appeal can and should be limited to those represented persons who themselves have taken some action in the district court to "preserve[ ] the arguments they seek to raise" on appeal. Pet. Br. at 13. That suggestion makes no analytical sense.

C. Petitioner's "Party To The Case" Theory

Petitioner's secondary argument is that in a Rule 23 class action case those individual class members who, on the publication of notice of a proposed settlement of the case, make a timely objection to that settlement, are, on that basis, "parties to the case" with a right to appeal the judgment approving the settlement. This "right to appeal" theory, while considerably narrower than Petitioner's main theory, is just as clearly wrong.

1. Petitioner's second theory cannot be squared with this Court's holding in *Marino v. Ortiz*, *supra*. In that Title VII class action lawsuit brought by minority police officers against the City of New York, white police officers—who were not members of the class and who had not intervened, but whose interests were affected by a proposed settlement of the class action case—first "*presented their objections* to the District Court at the hearing" on the proposed

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The general rule barring appellate consideration of arguments not "preserved" in the court below might properly be invoked to limit the scope of the arguments that would be open on an otherwise proper appeal from a final judgment in representative litigation—where, for example, arguments sought to be raised on appeal have not been made in the court below by *any* representative party or member of the represented group, thus denying the opposing party a fair opportunity to be heard on the point. *See generally Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

But we do not see how that general rule could properly be invoked to deny an appeal outright if in fact the represented person taking the appeal is "a party directly bound by the judgment" in the case. The threshold issue of the *right* to appeal is quite distinct from the issue of the proper *scope* of any appeal that is permitted, and that threshold issue must be disposed of on its own terms before the latter issue even comes into play. *See generally* 15A Wright, Miller & Cooper, Federal Practice & Procedure, § 3902.1, at 123-24 (2d ed. 1991) ("The conclusion that [certain] non[-named]-parties should be able to appeal does not of itself determine the scope of the arguments that should be open on appeal.").

settlement, and then sought to appeal from the judgment approving the settlement. 484 U.S. at 303 (emphasis added).

The *Marino* Court held that the objecting white police officers "were *not* parties to the underlying lawsuit" with a right to appeal from the judgment approving the settlement. *Id.* at 304 (emphasis added). Under *Marino*, then, a person not otherwise a party to a class action case does not become a party to the case by making and pursuing an objection to the approval of a proposed settlement of the case.

What the Eighth Circuit said of *Marino* in *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), is eminently correct:

> The Supreme Court [in *Marino*] was referring to officers who had filed objections to the settlement [there], and whose counsel was allowed to speak at the hearing and argue against the proposed settlement. . . . While they were not unnamed class members, they were in a position similar to the [unnamed class member appellant in the case before this Circuit] in that they were objecting to the approval of a settlement of the class action. . . . *Marino* [thus] provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so.[13]

2. Petitioner would distinguish *Marino* on the ground that class members who present objections to a proposed class action settlement do so "as a matter of *right*, pursuant to Rule 23(e)," whereas non-class-members who present

[13] *See also Felzen v. Andreas*, 134 F.3d 873, 874 (7th Cir. 1998), *aff'd by equally divided court sub nom., California Pub. Employees' Retirement Sys. v. Felzen*, 525 U.S. 315 (1999) ("[T]he Supreme Court held [in *Marino*] that a person adversely affected by the settlement of a class action may appeal from the consent decree based on that settlement only if he has intervened as a party.").

objections to such a settlement do so "as a matter of [judicial] grace." Pet. Br. at 19 (emphasis in original). But that distinction has no bearing on the question of "party" status.

There is nothing in Rule 23 (including the cited Rule 23(e)), or in any other Federal Rule, providing that class members who present objections to a proposed settlement of a class action case are "parties to the case"—just as there is nothing in Rule 23, or in any other Federal Rule, providing that non-class-member objectors are parties. To the contrary, the Federal Rules point *both* class member objectors *and* non-class-member objectors to a specific procedure by which they can become "parties to the case," and that specific procedure is Rule 24 intervention.

To be sure, the distinction between class members who have the right to object to a proposed class action settlement and non-class-members who do not have such a right may well be relevant to the issue of intervention, inasmuch as Rule 24 on its face distinguishes between intervention "of [r]ight" and "[p]ermissive" intervention. But nothing in the Federal Rules renders such a distinction relevant to the altogether different issue of whether *non*-intervenor objectors to a proposed class action settlement are "parties to the case" by reason of having made an objection.[14]

[14] Aside from his "objection as of right" theory, Petitioner argues that it is "implicit in the fact that absent class members are often allowed discovery into the justification for a class settlement" that class members are parties to a class action case. Pet. Br. at 28 n.14. But of course, if objecting class members were parties to a class action case, the class members would have a right to take discovery. Thus, district court actions, in the exercise of their sound discretion, to "allow discovery into the justification for a class settlement," *id.*—given Rule 23(d)'s grant of authority to such courts to "make appropriate orders . . . determining the course of [the class action's] proceedings . . . [and] dealing with similar procedural matters"—do not remotely imply that class members are parties to a class action case.

3. Petitioner's phrasing of his Question Presented—which speaks of the right to appeal of a "class member who . . . objects *and moves to intervene* . . ."—suggests that it is Petitioner's position that even if a class member does *not* become a party to the case by making an objection to the approval of a class action settlement, a class member does become a party by making an objection *and* moving to intervene.

In his brief, however, Petitioner presents no argument for the proposition that a class member's filing of a Rule 24 motion to intervene—in conjunction with the filing of an objection to a proposed class action or in itself—is a legal act that makes the class member a party to the case.

It therefore suffices, we believe, to point out that the filing of a Rule 24 motion to intervene, like the filing of any motion, is an act whose legal significance is determined by a judicial order disposing of the motion. If that motion is denied, the movant remains a person who is *not* a party to the case. There is thus no substance to the implied suggestion that the mere filing of a motion to intervene can in any circumstance make a class member a party to a class action case.

II. PETITIONER'S POLICY ARGUMENTS

Petitioner's legal text is that *all* class members in a Rule 23 class action case are "parties directly bound by a judgment" approving a settlement with a right to appeal therefrom, or, alternatively, that those class members who *object* to a proposed settlement are "parties to the case" with the right to appeal from a judgment approving the settlement. That text, as we have shown, is an incorrect statement of the law.

Petitioner's subtext is that without regard to whether they are parties, class members who object to a proposed settlement of a Rule 23 class action case should be deemed to have a right to appeal from a district court approval of the

settlement. The theme of this subtext is that because appellate review of district court approval of class action settlements is desirable, and because objecting class members are persons interested in and affected by the case, it is undesirable to limit the right of appeal to those who have become parties to the class action case through the Rule 24 intervention process.

This suggestion for re-writing the "right to appeal" rule is fundamentally unsound.

(A) The *Karcher/Marino* rule—and its corollary here that only third persons who have become parties to a class action through Rule 24 intervention have the right to appeal from a judgment approving a settlement of that action—has the benefits of formal precision and a high degree of certainty that are particularly desirable in a rule of civil procedure. As Judge Easterbrook has noted:

> Observance of form has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds. [In the present context,] [i]ntervention identifies with precision who is entitled to take what procedural steps, and when. [*In re Navigant Consulting, Inc. Securities Litigation*, 275 F.3d 616, 620 (7th Cir. 2001).]

Conversely, a standard that bases a non-party's right to appeal on such vague notions as an assessment of the non-party's interests and/or on the costs and benefits of allowing an appeal by the non-party is one that calls for the kind of inherently complex and inherently imprecise calculus of imponderables that breeds uncertainty.

(B) In the final analysis, Petitioner's claim that the *Karcher/Marino* rule is too narrow rests on the assertion that the Rule 24 intervention process places too great a burden on class members who wish to appeal a district court judgment approving a class action settlement. This undue burden argument is a hollow one. Since taking and pursuing an

appeal requires infinitely more time, effort and resources than does submission of a Rule 24 intervention motion, the claim that the intervention process is an obstacle that would preclude, or even give serious pause to, a person who would otherwise pursue an appeal does not ring true.

Indeed, Petitioner's undue burden argument rests in large part on exaggeration of what the Rule 24 intervention process requires of an objecting class member in the context of a proposed settlement of a Rule 23 class action case. In this regard, Petitioner and his *amici curiae* emphasize the supposed difficulties of intervention *before* a proposed settlement of a class action case is reached. *See* Pet. Br. at 36-37; Brief of *Amicus Curiae* Council of Institutional Investors at 11-12. *But see* 1966 Advisory Committee Notes on Rule 24. However, in the normal course, *after* a proposed settlement has been reached, the intervention process is straightforward and in no way taxing.

Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement does *not* adequately represent either the interests or the viewpoint of those class members opposed to the settlement. Thus, it should in the normal course be a relatively simple matter for an objecting class member (or, perhaps more likely, a group of objecting class members who have pooled their resources) to make the showing that she (or they) should be permitted to intervene in the case for the limited purpose of making and pursuing her (or their) objections to the proposed settlement.[15] Limited purpose intervention of this sort was approved by this Court in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

This is *not* to say that the Rule 24 intervention process is a "pro forma" one in the context of a proposed settlement of a

[15] As discussed *infra* at p. 36 n.18, Petitioner's motion to intervene in this case was *not* one made in the normal course.

Rule 23 class action case, Pet. Br. at 38, or one that "produce[s] no benefit to class action litigation" in that context, *id.* at 40.

The reality of the matter is that objectors to class action settlements come in all different shapes and sizes: some retain legal counsel and make a substantial commitment of time, energy and resources to the process, whereas others do not retain legal counsel and are content to file a piece of paper containing some variant of "I object" or "This is a terrible deal." *See, e.g.*, JA 103, 117-26. Moreover, there is evidence of a practice in which "obviously 'canned' objections [are] filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests [on behalf of class members]." *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp.2d 942, 973 (E.D. Tex. 2000).

Given that reality, it is evident that the Rule 24 intervention process is not a "pro forma" one in the context of a proposed settlement of a Rule 23 class action case, but rather one that allows the district court presiding over the case in passing on a motion to intervene to distinguish between: (i) objecting class members who make a credible showing that in pursuing their objections they intend to act and are capable of acting on behalf of and in the interest of *all* class members who oppose the settlement; and (ii) objecting class members who do not make such a showing (or, worse yet, show that they are proceeding in an effort to extract a fee by lodging generic, unhelpful protests).

A requirement of intervention as a prerequisite to an appeal of a class action judgment thus serves the vital purpose of assuring that the appellant is a person who is proceeding in the interest of the class in initiating a proceeding in a higher court. In this regard, Petitioner could not be more wrong in asserting that "[i]n the court of appeals, the objector proceeds in his individual capacity rather than as a representative of the class as a whole and he has no obligation to pursue any

interest other than his own." Pet. Br. at 31. To be sure, some appeals in class action cases involve (in Petitioner's words, Pet. Br. at 31) "unique circumstances" with respect to the individual appellant, such as a claim of improper inclusion or exclusion from the class. But an appeal of a judgment approving a class action settlement on grounds of claimed unfairness to the class of which the appellant is a member—the situation presented here—will *necessarily* have a broader, class-wide impact: affirmance or reversal of the district court's approval of the settlement will by its very nature affect the class as a whole.[16]

In this way, the Rule 24 intervention process can provide a benefit that more than balances the minimal burden on the movants by furthering the very purpose of the Rule 23 class action process—*viz.*, to provide for the fair, efficient and manageable litigation of a civil case affecting numerous persons through parties who have the willingness and the capacity to proceed in a manner that takes proper account of the interests of those affected persons.

Plainly, Rule 24 intervention motions by objecting class members who make this showing should readily be granted by the district court. And, "denials of such motions are, of course, appealable. *See United Airlines, Inc., supra*[, 432 U.S. 385]." *Marino*, 484 U.S. at 304. Moreover, the Seventh Circuit undoubtedly is correct that when an appellate court upholds an objecting class member's appeal from the denial of intervention, it can and should go forward with a dispositive ruling on that class member's objections to the settlement itself. *See Crawford v. Equifax Payment Serv., Inc.*, 201 F.3d 877, 879-81 (7th Cir. 2000); *In re Synthroid*

[16] For this reason, the cases relied on by Petitioner involving the "wholly individual interests" of persons claiming to have been improperly included in or excluded from a certified class, *see* Pet. Br. at 31, are inapposite.

Marketing Litigation, 264 F.3d 712, 715-16 (7th Cir. 2001). Thus, an intervention requirement does not raise any prospect of multiple successive appeals, with its attendant costs and delay.[17]

III. PETITIONER'S INTERVENTION ARGUMENT

In the final section of his brief, Petitioner first seeks to raise the question of whether the District Court's denial of Petitioner's motion to intervene and the Court of Appeals' affirmance of that denial were in error, and then argues that these rulings were in error and should be reversed by this Court. In Petitioner's words, "[i]f this Court *does* hold that a class member must intervene in order to appeal, the [Fourth Circuit] judgment [affirming the District Court's approval of the settlement] nonetheless must be reversed." Pet. Br. at 41 (emphasis in original). And Petitioner's most succinct statement of his asserted ground for reversing the judgment below is that "if intervention *is* required, the [D]istrict [C]ourt erred in refusing to permit [P]etitioner to intervene limited to the right to contest and subsequently appeal the settlement." *Id.* at 13 (emphasis in original). *See id.* at 41-42 (developing this asserted ground for reversal).

But the question Petitioner would now raise is *not* the single question set out in the *certiorari* petition nor a question fairly included therein, and is therefore *not* a question before this Court.

[17] Given the availability of Rule 24 intervention upon a proper showing (and the availability of appellate review if a Rule 24 intervention motion is improperly denied), there is no reality to Petitioner's suggestion that application of the *Karcher/Marino* rule in the present context will "limit an objector's recourse to a likely futile objection at the fairness hearing required by Rule 23(e)." Pet. Br. at 35 (internal quotations omitted). Thus, the "due process" concerns raised by Petitioner on the basis of that suggestion are wholly illusory.

The Fourth Circuit judgment affirming the District Court's approval of the settlement rests on two entirely separate holdings disposing of two entirely separate "right to appeal" claims raised by Petitioner in that court.

First, the Fourth Circuit unanimously rejected Petitioner's claim that the District Court erred in denying his motion to intervene in the case, that the denial of his motion should be reversed and that he should be treated as an intervening party with the right to appeal from the judgment approving the settlement here. *See* Pet. App. A10-A14 (Part II of Court of Appeals' opinion), A30 (Michael, J., concurring in that Part II ruling).

Second, the Fourth Circuit held, by a divided 2-1 vote, that as a class member who presented objections to the proposed class action settlement after his motion to intervene had been denied, Petitioner lacked standing to appeal the District Court's approval of the settlement. *See* Pet. App. A14-24 (Part III of Court of Appeals' opinion), A30-34 (Michael, J., dissenting from that Part III ruling).

The Court granted certiorari in this case to consider the following *single* Question Presented:

> Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement? [Pet. i.]

On its face, this Question Presented is not addressed at all to the Fourth Circuit's first holding—*viz.*, that Petitioner was properly denied intervention and was not entitled to be treated as an intervening party with the right to appeal the District Court's approval of the settlement. Rather, the Question Presented is addressed solely to the issue that was the subject of the Fourth Circuit's second holding—*viz.*, that as a class member who objected to a settlement after his motion to intervene had been denied, Petitioner lacked standing to appeal the District Court's approval of the settlement.

Indeed, if there were any room for doubt, that doubt is eliminated by the sole grounds stated by Petitioner for granting his petition: (1) The Fourth Circuit had, by its decision, added its voice to a substantial, pre-existing "circuit conflict over whether *an objecting class member* has standing to appeal a district court's approval of a settlement," Pet. at 11 (emphasis added); and (2) The Fourth Circuit's disposition of that issue was (i) in conflict with this Court's precedents recognizing the right of certain persons interested in and affected by a district court judgment to appeal therefrom without intervening in the case, *see id.* at 16-19, (ii) in tension with the due process rights of objectors *qua* objectors, *id.* at 19-22, and (iii) unsound from a policy standpoint owing to the useful role that objectors *qua* objectors could play in policing district court approvals of class action settlements, and the unnecessary burdens of an intervention requirement, *id.* at 22-25.

Equally to the point, the *certiorari* petition contained *no* argument, or so much as an intimation, that adequate grounds existed for a grant of *certiorari* on the separate question of whether Petitioner had improperly been denied intervention in the first instance and had a right to appeal the approval of the class action settlement as a person determined by an appellate court to be an intervening party.

Rule 14(1)(a) of this Court's Rules provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." And, this Court has repeatedly and consistently enforced that Rule, including most recently in *Owasso Independent School District v. Falvo*, 534 U.S. ____, 122 S. Ct. 934, 938 (2002), and *Toyota Motor Manufacturing, Inc. v. Williams*, 534 U.S. ____, 122 S. Ct. 681, 694 (2002). Petitioner does not cite any ground for a

departure from that Rule here—indeed, he fails even to acknowledge the Rule's application to the matter at hand—and there is none.[18]

[18] In his brief, Petitioner does attempt to work around Rule 14(1)(a) by suggesting that the Fourth Circuit's unanimous decision upholding the District Court's denial of intervention is predicated on a far-reaching, general statement of the law of intervention in the class action settlement context that "makes no sense" and "invites a deluge of protective intervention motions." *See* Pet. Br. at 42.

But the reality of the matter is that the denial of intervention here was firmly and soundly based on a confluence of highly unusual facts and circumstances unique to this case. Among other things: (i) Petitioner originally had been designated by the plaintiff trustees as the named class representative for the defendant retiree class, but had declined to serve in that capacity; (ii) Against the background provided by his subsequent litigation actions, Petitioner's stated reasons for declining to be the named representative party were not credible and cast reasonable doubt on Petitioner's capacity as an intervening party to proceed in a manner that furthered the interests of the class; and (iii) Instead of moving promptly for intervention upon the dismissal of his parallel Second Circuit action against the trustees, Petitioner wrote not one but two letters to the District Court asking the Court to make him a party, and then five months after his Second Circuit case's dismissal sought to intervene not only, or even primarily, to make objections to the class action settlement, but rather to litigate the case by, *inter alia*, filing motions for a preliminary injunction against the trustees, to strike evidence, and to disqualify class counsel. *See* JA 151-54 (District Court decision denying intervention); Pet. App. A10-A14 (Court of Appeals decision upholding that denial).

Quite aside from the fact that the ruling on Petitioner's motion to intervene was entirely case-specific, recognition of such an after-the-fact suggestion of certworthiness as a way around Rule 14(1)(a) could only serve to undermine that Rule's purpose and utility. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
I. The Fourth Circuit Erred In Holding That Objectors' Appeals Should Be Forbidden For Reasons Of Policy. 1
II. Class Action Objectors Are Parties To The Judgment And Thus Have The Right To Appeal To The Extent Of Their Objections. 3
III. Petitioner Prevails Under A "Pro Forma" Intervention Requirement, Although Such A Requirement Is Unwarranted. 11
CONCLUSION 20

TABLE OF AUTHORITIES

Other Authorities

Amchem Products, Inc. v. *Windsor*, 521 U.S. 591 (1997) 1

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) ... 16

Bowling v. *Pfizer, Inc.*, 132 F.3d 1147 (CA6 1998) 17

Cooper v. *Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) 6

Duhaime v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (CA1 1999) 19

Felzen v. *Andreas*, 525 U.S. 315 (1999) (equally divided court) 1, 15, 16, 19

Franks v. *Bowman*, 424 U.S. 747 (1976) 10

Guthrie v. *Evans*, 815 F.2d 626 (CA11 1987) 3, 20

Hansberry v. *Lee*, 311 U.S. 32 (1940) 5, 6, 7, 8

In re General Motors Corp. Pick-up Truck Fuel Tank Litig., 55 F.3d 768 (CA3), *cert. denied*, 516 U.S. 824 (1995) 17

Kremens v. *Bartley*, 431 U.S. 119 (1977) 10

Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982) 7

Marino v. *Ortiz*, 484 U.S. 301 (1988) (per curiam) 9

Martin v. *Wilks*, 490 U.S. 755 (1989) 5, 8

Matsushita Electrical Industries Co. v. *Epstein*, 516 U.S. 367 (1999) 5

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 5

Peralta v. *Heights Med. Ctr., Inc.*, 485 U.S. 80(1988) 14

Sosna v. *Iowa*, 419 U.S. 393 (1975) 9, 10

Tumey v. *Ohio*, 273 U.S. 510 (1927) 6

United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 18

United States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) 10

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 6

9

Fed. R. App. P. 42 19

Fed. R. Civ. P. 17(a) 4

Fed. R. Civ. P. 23 ..... 16, 17

Fed. R. Civ. P. 23(a) 4

Fed. R. Civ. P. 23(a)(4) 17

Fed. R. Civ. P. 23(d)(2) 16, 17

Fed. R. Civ. P. 23(e) 19

Fed. R. Civ. P. 24 ..... 16, 17

Fed. R. Civ. P. 24(a)(2) 17

Fed. R. Civ. P. 24(c) 17

S. Ct. R. 24.1(a) 13

13

2 NEWBERG, CLASS ACTIONS § 2755 (1977) 6

Marcel Kahan & Linda Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765 (1998) 20

REPLY BRIEF FOR THE PETITIONER

I. The Fourth Circuit Erred In Holding That Objectors' Appeals Should Be Forbidden For Reasons Of Policy.

Respondents' contention in this Court (at 28) that petitioner is relying on policy rationales as a "subtext" for reversal is wrong. It was the *majority below* that relied entirely on policy grounds – in particular, that appeals by objectors would be destructive of orderly class action litigation – to hold that objectors may not appeal. See Pet. App. A21-A24. Petitioner's opening brief (at 30-36) simply demonstrated that the Fourth Circuit's policy rationale is fundamentally flawed, and respondents' failure even to attempt to defend the decision below on its own terms is a telling admission.

Thus, there is no serious dispute that appeals by objectors identify important legal errors, as in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), which respondents studiously ignore. The potential for appeals also deters collusive class action settlements and encourages district court judges to consider objections studiously. The empirical data establishes that district court fairness hearings regarding proposed settlements tend to be perfunctory, and thus do not, standing alone, provide substantial protection to objectors, whose interests will be finally decided by the court's judgment. See generally Pet. Br. 28-41. And this Court's decision in *American Pipe & Products, Inc.* v. *Windsor*, 521 U.S. 591 (1974), and its progeny establish that the Federal Rules should not be construed to as to invite unnecessary, burdensome, and distracting motions to intervene. See Pet. Br. 37-38.

The Solicitor General joins in these points here (at 3-9) just as he did in *Felzen* v. *Andreas*, 525 U.S. 315 (1999) (equally divided court). The government thus explains that class actions can be abused by class representatives and their lawyers and that allowing objector appeals provides an important safeguard "by

assuring that judgments approving [class] settlements are subjected to appellate scrutiny."[1]

Respondents echo the Fourth Circuit's reasoning in only one respect, contending that, if class action objectors may appeal, they will effectively have the power to take over the case. Resp. Br. 22-24. But, just as the class representative has no power to preclude the presentation of objections in the district court under Rule 23, she has no such power on appeal. And on appeal, objectors may press only their objections to the settlement because (a) the appeal lies from that aspect of the district court's decision rejecting his individual objections, and (b) a party may raise on appeal only the issues that he properly pressed below. Objectors may not, for example, contest the district court's rulings on discovery, or granting summary judgment on certain claims, on any number of the many issues that arise during the course of litigation. Objectors thus cannot be said to "usurp" any prerogative of the class representative. Petitioner's position is thus *not* that a class member "is entitled to assume the role of the named representative party." Resp. Br. 21.

Similarly, nothing about petitioner's position implies that objectors could usurp the representative's role in the district court prior to settlement or on appeal from a litigated judgment. Objectors have the right to pursue their individual objections in district court and on appeal only because the representative no longer acts in the objectors' interests once a settlement has been proposed. Respondents themselves press this distinction: "Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement does *not*

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[1] Nor is there a realistic prospect, unique to class actions, of strategic appeals to gain leverage in the litigation. The only example given of supposedly strategic behavior (*Duhaime* v. *John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 6 (CA1 1999)) merely speculated regarding the possibility of improper objections and appeals, but found no such impropriety, and in any event the same prospect arises if objectors instead intervene before appealing. The proposed revisions to Rule 23 therefore address the *Duhaime* concern by requiring the court's permission before objections may be withdrawn. 201 F.R.D. 560, 617- 631-32 (2001).

adequately represent either the interests or the viewpoint of those class members opposed to the settlement." Resp. Br. 30 (emphasis in original).[2] Absent such a conflict in interests, the representative is the class member's champion, both in the district court and on appeal.[3]

This case, moreover, presents the strongest possible circumstance for permitting an objector to appeal. Petitioner not only properly presented his objections, but the district court entered an *injunction* against Petitioner acting in contravention of its judgment approving the settlement. There cannot be any serious argument that his interests are not sufficiently affected by the proceedings in the district court to take an appeal. J.A. 174-77.

II. Class Action Objectors Are Parties To The Judgment And Thus Have The Right To Appeal To The Extent Of Their Objections.

A. Class Action Objectors Have The Right To Appeal As "Parties" Because They Are Bound By A Class Action Judgment.

1. Respondents do not seriously contest the section of petitioner's opening brief (at 16-24) demonstrating that, under this Court's precedents, the right to appeal extends to all parties "*to the judgment*" as opposed to merely "named" parties.

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[2] Indeed, the class representative's counsel would be disabled from acting on the objector's behalf. See, *e.g.*, Model Rule of Prof. Conduct 1.7(b).

[3] The decision invoked by respondents (*Guthrie* v. *Evans*, 815 F.2d 626 (CA11 1987), *quoted at* Resp. Br. 23) is inapposite precisely because it involved an appeal from a litigated judgment that had imposed a permanent injunction. Moreover, in *Guthrie*, the putative appellant had not participated in the district court proceedings from which he sought to appeal. See 815 F.2d at 627. Thus, whether described as a lack of appellate "standing" (*id.*), or as a failure to participate below, the essential problem in *Guthrie* was one of unfair surprise, and thus is akin to the ordinary prohibition against raising on appeal issues that have not been raised in the district court. See *supra*.

Respondents correctly note (at 14-15) that certain provisions of the Federal Rules of Civil Procedure (those identifying the persons who may raise claims or take discovery) generally refer to "parties" as the named plaintiffs and defendants. But the Civil Rules are not determinative of what persons are "parties" for purposes of the right to appeal, as respondents essentially admit by acknowledging (at 22) the many classes of persons who are not named plaintiffs and defendants (and thus cannot state claims or take discovery in the district court) but may nonetheless appeal. See Resp. Br. 22 (discussing, *e.g.*, putative intervenors and sanctioned attorneys).

In any event, the Civil Rules equally assign "party" status to any person on whose behalf the named plaintiff or defendant acts. Rule 17(a) thus provides that persons such as an "executor, administrator, guardian, bailee [or] trustee * * * may sue in that person's own name without joining *the party* for whose benefit the action is brought" (emphasis added). In a class action, the named representative is (as Rule 23(a) provides) a "*representative* party" and must exercise her rights under the Civil Rules not just in her own personal interest, but also in the interest of all the class members, who are equally "parties" on that basis.

2. Respondents therefore principally press the argument that an objecting class member is not a "party" because he is not bound directly by a class action judgment. This theory of class action judgments, even if accepted, would not change the outcome of this case. However one describes the *manner* in which class members are bound, there is no question that they are in fact bound. As a result, they have an *a fortiori* right to appeal under this Court's long-standing precedents recognizing the right to appeal of quasi-parties – *i.e.*, persons who have the right to appear in the case, do appear, and are directly affected by the judgment. See Pet. Br. 20-22.[4]

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[4] Respondents assert that, in some of the quasi-party cases, the appellant "intervened." But as the Solicitor General explained in his brief in *Felzen* (at 8 n.3), at the time the quasi-party cases were decided, the term "intervention" did not carry with it the same connotation of a formal appearance as a party for all purposes. Ultimately, the significance of the other quasi-party cases is not the *means* by which various individuals gained access to a case, but rather *the mere fact* that they had gained access and had a final decision rendered on their arguments so presented. Here, petitioner had access as a matter of right, not grace, made use of that access to present his objections, and had a final decision on those objections rendered by the court. He thus has as much a right to appellate review of such decision as do any other participants in a case, whether parties proper or quasi.

But in any event, respondents seriously misunderstand the effect of a class action judgment on the individual class members. Respondents emphasize, and this Court reiterated most recently in *Ortiz* v. *Fibreboard Corp.*, that there is a "due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" 527 U.S. 815, 846 (1999) (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). But respondents simply fail to understand the import of the fact that, as this Court has often repeated, class actions are "'an *exception* to the general rule.'" *Id.* (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989) (emphasis added)).[5]

As an "exception" to the general rule, class members are personally bound notwithstanding that they were not named parties in the district court. As *Ortiz* explains, in a class action judgment, "*[t]he legal rights of absent class members * * * are resolved* regardless either of their consent, or, in a class with objectors, their express wish to the contrary." 527 U.S. at 846 (emphasis added). The Court made the same point in *Matsushita Electrical Industries Co.* v. *Epstein*: "[A]ll members of the class, whether of a plaintiff or defendant class, *are bound by the judgment* entered in the action unless, in a Rule 23(b) action, they make a timely election for exclusion." 516 U.S.

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[5] There is also a bitter irony in respondents' attempt to invoke the "day in court ideal" to conclude that a class action objector, unlike any other person whose interests are adjudicated in a case, may not have a day in an "appellate court."

367, 379 (1996) (quoting 2 NEWBERG, CLASS ACTIONS § 2755, at 1224 (1977), and citing *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984)).

Respondents err in their reliance (at 17-18) on this Court's determination in *Hansberry* v. *Lee* that a judgment is binding only to the extent that the class representative adequately represented the class members' interests. The relevant point is *Hansberry*'s confirmation that, unless and until there is a successful collateral attack, the class members are "*bound by the judgment*." 311 U.S. at 42. Moreover, *Hansberry* manifestly does *not* turn on any "fundamental *distinction* in the law of judgments" (Resp. Br. 19 (emphasis in original)) between class representatives, who are bound directly by a judgment, and class members, who (supposedly) are not. There is no such distinction. *Hansberry* merely applied the basic principle that any judgment, including a class action judgment, may not be enforced to the extent it was entered in violation of due process. Thus, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of *absent parties* who are to be bound by it." 311 U.S. at 42 (emphasis added).

The principle announced in *Hansberry* is not, contrary to respondents' argument, peculiar to unnamed class members. Instead, the Court in *Hansberry* relied on the holding of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), that a plaintiff or defendant may not be deemed bound by the result in "a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants." 311 U.S. at 45. That basic rule of due process applies to a class representative as well, such that a judgment entered against a named representative would be equally void, and equally subject to collateral attack, if entered without notice and an opportunity to be heard. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." (citing *Hansberry*)); cf. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.").[6]

Nor is there merit to respondents' position (at 16-17) that class members are not "parties to the judgment" because they are merely "privies" of the class representatives, or to their related argument (at 24) that, if class members have the right to appeal, then so must every other "privy" who will be bound as a matter of *res judicata*. Respondents completely misunderstand the one case they cite, *Richards* v. *Jefferson County*, 517 U.S. 793 (1996). *Richards* held that a judgment in a prior suit was not *res judicata* as to a suit later brought by different persons as a class action. The question of privity was whether the class was sufficiently in privity with the parties to the first suit, *not* whether the class members were in privity with the class representative.

Respondents latch on to *Richards*' statement that one need not necessarily have been "a party to a judgment in order to be bound by it," including "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." 517 U.S. at 798. But *Richards* does not equate class members with privies. Rather, it discusses class actions in a separate paragraph, which avowedly sets forth "addition[al]" examples departing from the general rule, and which has nothing to do with privity. *Id.* (discussing not only

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[6] Respondents' reliance on *Hansberry* is particularly surprising because of the natural parallel between that case – which was a successful challenge to a class action settlement approving a restrictive racial covenant – and this one. The *Hansberry* petitioners were unaware of the prior class action, and thus did not object or appeal but rather collaterally attacked the adequacy of the representative party. According to the respondents in this case, however, if the *Hansberry* petitioners had stated objections to the settlement in the prior case, and those objections had been rejected, they would have been *prohibited from appealing*. There is no warrant for immunizing trial court errors from review in that fashion.

class actions but also "special remedial scheme[s] * * * expressly foreclosing successive litigation by nonlitigants"). Any ambiguity on this score is resolved by *Hansberry* itself, which explained (311 U.S. at 38) that it was uncontested that the class members in that case were not in "privity" with the named parties, wholly apart from whether they might be bound by the class judgment.

The error in respondents' position is also evident from their immediate retreat from it. Thus, respondents themselves seem to recognize that class members are directly bound by a class action judgment, but they rely on this Court's statement in *Martin* v. *Wilks* that the judgment is binding when a class member, "*although not a party*, has his interests adequately represented by someone with the same interests who is a party." 490 U.S. at 762 n.2 (emphasis in Resp. Br. at 17). They similarly invoke the statement in *Hansberry* v. *Lee* that the petitioners in that case "were not parties" to the contested state court judgment. *Wilks* and *Hansberry*, however, involved only the preclusive effect of a judgment on persons who were neither plaintiffs nor defendants in the prior suit, and the Court was accordingly not referring to a "party" in the sense of the right to appeal. The Court just as frequently referred to class members as "absent parties." See *Hansberry*, 311 U.S. at 42, 43, 44, 45; see also Pet. Br. 25-26 (detailing this Court's precedents describing class members as "parties" and "absent parties").

Finally, that petitioner correctly describes the preclusive effect of a class action judgment is readily apparent from the facts of this case, and from respondents' litigation of the case in the lower courts. The settlement agreement embodied in the district court's judgment fundamentally alters the rights and obligations of the respondent trustees with respect to each plan member, including petitioner. The judgment thus leads directly to a substantial reduction in petitioner's individual pension, precluding him from challenging respondents' modification of the plan's terms. On that very basis, respondents successfully secured an injunction prohibiting petitioner *in personam* from acting in contravention of the district court's judgment by litigating related issues in any other forum. See J.A. 174-77.

Respondents totally fail to explain how, if they are now correct that petitioner is not bound by the settlement, the judgment in this case adjudicates petitioner's individual rights as the district court held.[7]

B. Class Members Are "Parties" For Purposes Of The Right To Appeal At The Point The Class Is Properly Certified.

Petitioner's opening brief explained that *Sosna* v. *Iowa* and its progeny hold that, at the point of certification, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the class representative]," because that is the point at which "the decision will bind" all the class members. 419 U.S. 393, 399 & n.9 (1975). *Sosna* thus held that when the class representative's claims become on moot on appeal, the appeal need not be dismissed because a continuing case or controversy exists as to the individual class members, who are equally bound by the judgment. See also Pet. Br. 26-27 (discussing *Sosna*'s progeny). By parity of logic, a member of a certified class is a "party" who can appeal in his own right.

Respondents' answer (at 20-21) is to contend that *Sosna* actually held that, upon certification, the "class" as an *entity* – as opposed to its individual constituent members – has an interest in the judgment. But respondents simply confuse the question whether all the members of the class are bound with the separate question, at issue in *Sosna*, whether the individual class members are bound by the judgment and thus raise a sufficient case or controversy to present the case from becoming moot. Thus, in a class action, only the individual class members (as

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[7] In Part I-C of their brief, respondents attack a straw-man, contending that it is not sufficient for a person merely to "object" to a settlement to have the right to appeal. Petitioner's position is not that an objection is a *sufficient* condition to "party" status, but that it is a *necessary* condition. The objection must be stated by a class member who is, as just explained, bound by the judgment. Respondents' reliance on *Marino* v. *Ortiz*, 484 U.S. 301 (1988) (per curiam), is thus misplaced because, as even the majority below acknowledged, the putative appellants in that case were not members of the class. See Pet. Br. 19-20; Pet. App. A15 n.12.

opposed to the aggregated entity) can have an Article III case or controversy. In turn, "classes" don't appeal; individuals do. Respondents' argument is just an attempt to undo this Court's repeated holding (see *supra*) that a class action judgment binds each class member individually.

Respondents' description of *Sosna* is thus wrong. *Sosna* explained that the significance of certification was that "all *persons*" in the class would be bound (419 U.S. at 399 n.9 (emphasis added)), and the Court held there was an ongoing controversy because "it is clear that [the appellees] will enforce [the challenged statute] against those *persons* in the class that appellant sought to represent and that the District Court certified" (*id.* at 400 (emphasis added)). The Court then articulated its rule as follows: "The controversy may exist * * * between a named defendant and *a member of the class* represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402 (emphasis added). See also *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397-98 (1980) (specifically relying on this statement of *Sosna*'s holding). Subsequently, in *Franks* v. *Bowman*, 424 U.S. 747, 756 (1976), this Court applied *Sosna* to hold that an appeal in a Title VII class action was not moot because the appellant class representative could pursue the interests of "[t]he unnamed members of the class involved [who] are *identifiable individuals, individually named* in the record" (emphasis added).[8]

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[8] Respondents' further reliance on *Kremens* v. *Bartley*, 431 U.S. 119 (1977), is similarly mistaken. Respondents quote *Kremens* for the proposition that, to avoid mootness, there must be a "proper 'substitution of class representatives with live claims'" (Resp. Br. at 21 (quoting 431 U.S. at 135)), but they omit any mention of the context of that decision. *Kremens* did not overrule *Sosna* and *Franks*, *supra*. Rather, intervening developments in *Kremens* had squarely called the class certification into question, such that it was unclear which individuals actually remained bound by the judgment. In that circumstance, the Court required not merely "substitution" but also "reconsideration of the class definition." 431 U.S. at 134. As the Court explained, but respondents ignore, "The factors which we have just described make the class aspect of this litigation a far cry indeed from that aspect of the litigation in *Sosna* and in *Franks*, where we adjudicated the merits of the class claims notwithstanding the mootness of the claims of the named parties." *Id.* at 131.

* * * *

Because class action objectors are "parties" to the judgment, they have the right to appeal without intervening in the case. For the reasons described *infra*, a more formal intervention requirement is unwarranted.

III. Petitioner Prevails Under A "Pro Forma" Intervention Requirement, Although Such A Requirement Is Unwarranted.

The government argues (at 18-21), and respondents basically acknowledge (at 30), that this Court should adopt the Seventh Circuit's rule that an objector's right to appeal should be contingent on the objector filing a motion to intervene, which the district judge should grant essentially as a matter of course. The government thus asserts (at 21) that a class member who seeks to intervene generally "will satisfy Rule 24(a)'s interest, timeliness, and inadequate representation requirements, and, thus, be entitled to intervene for that limited purpose." According to the government (at 24), the objector need not show that he is an adequate representative for any other member of the class but only "that his own interests will not be fairly represented *on appeal*, a showing that in most cases may be made simply by pointing to the class representative's interest in foregoing an appeal" (emphasis in original). Intervention should be allowed in those circumstances, it maintains, because objectors "belong to the settlement class and will be bound by the judgment" (*id.* at 21), and because "inadequate representation will invariably be present when a class member seeks to appeal approval of a class action settlement over his objection" (*id.* at 23).

Although petitioner would be entitled to appeal on the government's approach, this Court should reject this invitation to create what amounts to no more than a procedural hurdle to

appeals by objectors. Furthermore, to the extent this argument contemplates that district courts would screen objectors' appeals, it lacks any foundation in the Rules of Civil Procedure or the experience of the federal courts.

A. Petitioner Has Properly Presented And Preserved The Argument That He Would Prevail Under A *Pro Forma* Intervention Rule.

It is undisputed that petitioner moved to intervene in this case pursuant to Rule 24 as soon as respondents proposed their settlement. The government and respondents nonetheless argue that, if this Court were to adopt a *pro forma* intervention requirement, the judgment in this case should be affirmed. The Solicitor General presses two arguments (only one of which is joined by respondents), both of which are meritless.

First, the government (at 29) and respondents (at 34) contend that the Question Presented does not encompass the Seventh Circuit's standard. But the *pro forma* intervention rule is not only "fairly encompassed" by the Question Presented in the Petition for Certiorari, it is *explicitly* encompassed by it. The question asks: "Whether a class member who, upon receiving notice of a proposed class action settlement, objects and *moves to intervene* has standing to appeal the district court's approval of the settlement" (emphasis added).

Respondent could not be more wrong in stating (at 35) that "the *certiorari* petition contained *no* argument, or so much as an intimation, that adequate grounds existed for a grant of *certiorari*" on this issue (emphasis in original). The Petition specifically argues that certiorari should be granted because the Fourth Circuit's decision conflicts with the Seventh Circuit's rule. The Petition states in the introduction (at 2): "petitioner would have been allowed to appeal in the Seventh Circuit." The Reasons for Granting the Writ section then devotes an *entire page* to the issue, explaining, for example: "The Seventh Circuit would permit petitioner to appeal as well, although on a different basis. That court would hold that, although petitioner does not have standing to appeal as an objector, he does have standing to appeal as an *intervenor*" (emphasis in original). The certiorari

Reply Brief (at 8) returned to this precise issue, explaining that petitioner would prevail under the Seventh Circuit's standard and that "the relevant point here is that the Fourth Circuit *rejected* the Seventh Circuit's approach – it held that petitioner could not appeal notwithstanding that he had sought to intervene well before the district court approved the settlement" (emphasis in original).

The Solicitor General's contrary position that the Question Presented does not encompass this issue is impossibly confusing, for he repeatedly demonstrates that he does not believe his own argument. The government's brief (at i) restates the Question Presented as "[w]hether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement." See also *id.* at 9 (same); S. Ct. R. 24.1(a) ("The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents.").

Second, the government contends (at 28) that petitioner did not specifically invoke, and the Fourth Circuit did not specifically reject, the Seventh Circuit's rule in those terms in the proceedings below. To put it charitably, this is nitpicking. Petitioner argued in the Fourth Circuit that he was entitled to appeal either as an intervenor or as an objector, and the court of appeals' entire opinion is devoted to rejecting those arguments. If nothing else, the Fourth Circuit "passed upon" this issue when it held (Pet. App. A12-A13, A21-A24) that class members generally may *not* intervene once the settlement is proposed because they will interfere with the class representative's administration of the case. Even *respondents* admit (at 34) that the issue was sufficiently resolved below. And, once again, the Solicitor General contradicts himself: if the government really believed that the *pro forma* intervention rule was not passed upon below, it could not ask this Court to adopt it. "This Court's practice is to 'deal with the case as it came here and affirm or reverse based on the ground relied on below.'" S.G.

Br. 28 (quoting *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988)).[9]

Finally, it bears emphasizing both that the district court *did* believe that petitioner had satisfied any "screening" criteria that might constrain an objector's right to appeal, and furthermore that respondents consciously led the district court to conclude that petitioner could appeal without intervening. As petitioner's opening brief detailed and respondents notably do not contest, respondents not only *categorically* took the position that it was unnecessary for petitioner to formally intervene to protect his interests, but furthermore secured approval from the district court of a class notice that explicitly contemplated objector appeals. Pet. Br. 6-7. The district court, in turn, rejected petitioner's objections, but stated on the record that, "if I'm wrong, you got an appeal." J.A. 154. Later, the district court reiterated: "I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course." C.A. Supp. App. 1240. Respondents are judicially estopped from taking the contrary position in this Court. See *New Hampshire* v. *Maine*, 532 U.S. 742 (2001); *Pegram* v. *Herdich*, 530 U.S. 211, 228 n.8 (2000).[10]

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[9] The government's passing suggestion (at 27, 29) that petitioner's merits brief does not sufficiently present this issue is inexplicable. As even respondents acknowledge (at 33), an entire *section* of petitioner's merits brief (Part IV, at 41-43) is devoted to it. The government's further suggestion (at 28) that petitioner did not properly raise this issue in the district court because "he sought to intervene *not only* to move to oppose the preliminary approval of the settlement, but also to take discovery, secure an injunction, and disqualify class counsel" (emphasis added) contradicts its own proposal (at 14) that objectors should move to intervene and the district court should enter an order under Fed. R. Civ. P. 23(d)(3 that permits them to intervene but then "condition[]"their participation to appealing.

[10] Respondents are similarly estopped from asserting their newfound position (at 30) that the class representatives did not provide adequate representation once the settlement was proposed. They strenuously, and successfully, pressed the opposite position below. See J.A. 84-86; Resp. C.A. Br. 41-42.

B. A *Pro Forma* Intervention Requirement Is Unwarranted.

In the *Felzen* case, the Solicitor General, on behalf of the S.E.C., argued that this Court's quasi-party precedents firmly established the right of objectors to appeal without intervention, and advised this Court:

> [T]he standards for objecting under Rule 23.1 *are different* from intervention under Rule 24, and it was precisely that point that the [court in the leading case of *Cohen* v. *Young*, 127 F.2d 721 (CA6 1942)] recognized in ruling that an objecting shareholder had a limited right to appeal without demonstrating that the standards for intervention had been satisfied.
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> * * * *
>
> The court of appeals [in *Felzen*] concluded that if the objecting shareholders wished to appeal, they must first intervene as parties. As a practical matter, that conclusion imposes *an unnecessary requirement.* By appealing the district court's approval of the settlement, the objecting shareholders are merely seeking to persuade the court of appeals that the district court erred in rejecting the arguments they were required to make if they hoped to avert the imposition of a binding judgment adverse to their interests. Requiring intervention as a party for the purpose of making an appearance in the court of appeals threatens to interpose an *unwarranted obstacle* to what historically has been an essentially automatic right that comparably situated quasi parties have had to pursue their appeals.

Gov't Br. at 24.

With barely a side-long glance at those unambiguous arguments (Br. at 27 n.27), the Solicitor General now takes the opposite view.[11] The government says its new position is the

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[11] The government notes (at 27 n.13) that, in a footnote in its *Felzen* brief, it referred to "a settlement that has yet to be proposed or accepted."

result of "further consideration" (*id.*) but the real reason is transparent. In *Felzen*, the Solicitor General spoke on behalf of the S.E.C. as a regulating entity. Because the decision in this case will apply to all civil litigation, the Solicitor General now advances the government's interest *as a class action defendant* as "a named party in numerous class actions brought under Federal Rule of Civil Procedure 23" (Br. 1) because the decision in this case will apply to all civil litigation. With respect, petitioner submits that the views expressed by the government's *Felzen* brief, which were unadorned with its own litigating self-interest, are more well founded.

The government, unable to find any statutory basis for arguing that class members who are already "parties to the suit" (*American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550 (1974)) must nevertheless intervene, latches on to the 1966 amendments to Rules 23 and 24, which it claims (at 14) "establish intervention as the mechanism by which non-named class members may enter the action when necessary to protect their interests * * *, including with respect to appeals." Not so. Rule 24 does not mention Rule 23 class actions, let alone suggest that class action settlements may be appealed only by a Rule 24 intervenor. For its part, Rule 23 mentions intervention only with respect to class members who may wish "to intervene *and present claims and defenses*." Fed. R. Civ. P. 23(d)(2) (emphasis added). As explained in petitioner's opening brief, that is the principal purpose of Rule 24 intervention: to allow interested persons to litigate claims and defenses that they believe are not being adequately advanced by the named litigants. Objectors such as petitioner seek no such right.[12]

But its position in *Felzen* was not limited to intervention prior to the submission of a settlement. Indeed, the case cited by the government in that footnote – *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974) – stands squarely for the proposition that unwarranted intervention requirements should not be imposed because they simply result in unnecessary collateral litigation.

[12] Seeking to fit within the scheme of Rule 24, the Solicitor General states that the objector's motion to intervene should include "notice

After claiming (at 12) that the "Federal Rules" "[s]pecify" intervention as the avenue for appeal, the government relies *not* on the text of the Rule itself, but rather on two snippets from the 1966 Advisory Committee Notes, neither of which have anything to do with the question presented here. The Note to Rule 23(d)(2) – a Rule which concerns supplemental forms of court-ordered notice to the class – states that a class action notice may "encourage interventions to improve the representation *of the class*" (emphasis added). Like the Rule itself, that statement in the Note plainly pertains to intervenors who (unlike objectors such as petitioner) wish to *litigate* the underlying action as *representative parties*, and thus the purpose of intervention is to allow a class member to take over the litigation. The same is true of the Note to Rule 24(a)(2), which provides that intervention is appropriate when a trust beneficiary can show that the current trustee is an inadequate representative, and that "similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of representation of his interest by the representative parties before the court."[13]

Without any support in (or even citation to) the text of Rules 23 or 24, the government turns to case law, which it claims

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pleading stating his claims or defenses" as required by Rule 24(c). However, an objector is not pursuing "claims or defenses" different from the other class members, but instead seeks only to defeat the class settlement, which simply underscores that the Rule's drafters did not contemplate Rule 24 intervention as procedural prerequisite for objector appeals.

[13] Moreover, if intervention were the method contemplated by the drafters for class members to challenge a class settlement on appeal, that would effectively reduce the merits of the class settlement to one issue – adequacy of representation. See Fed. R. Civ. P. 23(a)(4), 24(a)(2). However, there are many other legitimate bases for overturning a class settlement or its fees component on appeal. See, *e.g.*, *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (CA3), *cert. denied*, 516 U.S. 824 (1995) (settlement's benefits not fair exchange for release of class members' claims); *Bowling* v. *Pfizer, Inc.*, 132 F.3d 1147 (CA6 1998) (excessive attorney's fees).

supports the proposition that class members who object to an settlement must intervene to continue their objections in the court of appeals, relying chiefly (at 17) on *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). In that case, the district court had denied class certification in a Title VII gender discrimination action. As a result of that ruling, the non-named plaintiffs were *not* parties to the action and would *not* be bound by any subsequent judgment of the court. See *supra*. Thus, at that juncture, intervention was the only means for the unnamed class members to participate further in the litigation (if the class representatives did not take further action), because their legal interests had been formally excluded from the litigation. The sole question before this Court was whether a member of the uncertified class, who sought to intervene after judgment to appeal the district court's denial of certification, was a timely intervenor, and the Court held that she was. Petitioner's situation is exactly opposite to that of the putative appellant in *United Airlines*: Rather than being ousted from the litigation, the district court's decisions in this case certifying the class and approving the class settlement confirmed petitioner's party status and that he would be bound by the judgment just as assuredly as would the named plaintiffs. Thus, intervention would be redundant; it would merely corroborate a status that petitioner had already attained.

Just as important, no provision of the Rules permits a district court to undertake, as the government proposes (at 28), to choose between potential objector appellants or otherwise screen out objectors. Rule 24 permits intervention; once granted, the intervenor has a categorical right to appeal. Rule 23(d), on which the Solicitor General relies, lists a number of devices the district judge may do to manage class actions, but all of them relate to the district court proceedings, and none of them *approach* forbidding a class member from appealing. And the government's proposed approach to intervention invites the pernicious possibility that the objector "chosen" by the district court will not advance certain arguments favored by those objectors who were "rejected" by the district court, or worse still, will settle or voluntarily dismiss the appeal (see Fed. R.

App. P. 42; *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (CA1 1999), *cited in* U.S. Br. 28 n.12), leaving the non-appealing objectors subject to a settlement that they regard as unfair or unlawful, and which they were denied the opportunity to appeal.

Moreover, the examples given by the government as a basis for interposing the district court as appellate gatekeeper make no sense. Each posits a situation in which the objector does not have standing to challenge the settlement *even in the district court*, such as when the objector is not, in fact, a class member or is not entitled to settlement relief. If the defect in the objector's standing can be discerned at all, it will have already become apparent during the course of the Rule 23(e) fairness hearing process. Any dispute over the objector's status will be resolved at that earlier stage, not in the context of a motion to intervene for the purpose of appeal. The government's supposed concerns rest on a view of class action litigation that is totally imagined. Thus, the Solicitor General does not (because he cannot) cite a single case suggesting either that any of his concerns *ever* arise in practice, or that intervention for the purpose of appeal is an appropriate procedure for addressing those concerns. Nor does he cite a single court that has ever, in the history of the Federal Rules, adopted his proposal; petitioner is aware of none.[14]

The government claims that its intervention requirement would not pose a burden on objectors because the motion would be a formulaic request based on the objector's obvious interest in taking an appeal from a settlement that the named plaintiffs favor. But, as the Solicitor General pointedly argued in *Felzen* (at 24), intervention is nothing more than an "unnecessary requirement." The government (now in its role as a litigating defendant) ignores the burdens imposed by the intervention

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[14] As noted *supra*, the Seventh Circuit deems the intervention requirement entirely *pro forma*; the district court has no role in screening objectors' motions to intervene, and certainly does not pick *which* objectors have a right to appeal or use intervention as a tool to determine class membership and the like, as the government now suggests.

requirement on objectors, on the district court (which must adjudicate the motions), and on the courts of appeals (because objectors will likely challenge a denial of intervention on appeal). The government's position, like the respondents', also ignores the fact that objectors are often *pro se* and will have no idea that they are expected to seek intervention to preserve their appellate rights.[15]

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

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[15] The Eleventh Circuit in *Guthrie* v. *Evans*, upon which both respondents and the government rely, also supported its intervention requirement by stating that collateral attack – the filing of a separate, post-judgment lawsuit attacking the validity of the settlement – is a better alternative to appeal. 815 F.2d 626, 628 (1987). But that approach is unfair to class members and undermines the interests of the litigants and the courts in finality. As explained *supra*, an absent class member would be entitled to collaterally attack a judgment approving a class action settlement when due process was the basis for the attack, but would *not* be able to challenge the fairness of the settlement or other legal impediments that generally can be contested on direct review. That being the case, a collateral attack is a poor substitute for a direct appeal that can protect all of the absentees' legal interests. See generally Marcel Kahan & Linda Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765, 780 & n.69 (1998) (hailing superiority of comprehensive direct review over collateral attack and criticizing intervention requirement as potential impediment to appellate review). Moreover, regardless of the scope of collateral attack, it is generally preferable to have challenges to a class action settlement heard in the original forum, with direct appellate review, rather than to encourage each class member to file a separate suit, in a distant forum, challenging the *res judicata* effect of a previously entered class action judgment.

Respectfully submitted,

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v.

ROBERT A. SCARDELLETTI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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38 pp

QUESTION PRESENTED

Whether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement.

TABLE OF CONTENTS

	Page
Interest of the amici	1
Statement	2
Summary of argument	6
Argument:	
A class member may appeal a judgment approving a class action settlement over his objection by intervening for the limited purpose of taking such an appeal	8
A. This Court's quasi party cases support allowing objecting class members to appeal	9
B. The federal rules specify intervention as the means by which non-named class members may enter the action	12
C. In the typical case, an objecting class member will be entitled to intervene for the limited purpose of taking an appeal	18
D. The intervention procedure promotes both fairness and efficiency	21
E. The court of appeals properly rejected petitioner's appeal in this case	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alaska v. *Suburban Propane Gas Corp.*, 123 F.3d 1317 (9th Cir. 1997)	16
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997)	8
American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974)	19, 23
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Cases—Continued: Page

Auto Workers v. *Scofield*, 382 U.S. 205 (1965) 10
Baker v. *Wade*, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) 16
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 13
Bayard v. *Lombard*, 50 U.S. (9 How.) 530 (1850) 10
Becker v. *Montgomery*, 121 S. Ct. 1801 (2001) 13
Bell Atlantic Corp. v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993) 22
Blossom v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863) 6, 10, 11
Brand Name Prescription Drugs Antitrust Litig., In re, 115 F.3d 456 (7th Cir. 1997) 19-20
Bryant v. *Yellen*, 447 U.S. 352 (1980) 16, 27
California Pub. Employees' Ret. Sys. v. *Felzen*, 525 U.S. 315 (1999) 27
Chardon v. *Soto*, 462 U.S. 650 (1983) 23
Crawford v. *Equifax Payment Servs., Inc.*, 201 F.3d 877 (7th Cir. 2000) 27
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 20
Diamond v. *Charles*, 476 U.S. 54 (1986) 9
Duhaime v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999) 24
Edwards v. *City of Houston*, 37 F.3d 1097 (5th Cir. 1994) 20
General Tel. Co. v. *Falcon*, 457 U.S. 147 (1982) 23
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Hansberry v. *Lee*, 311 U.S. 32 (1940) 9, 11
Hovey v. *McDonald*, 109 U.S. 150 (1883) 11
Karcher v. *May*, 484 U.S. 72 (1987) 10
Kneeland v. *American Loan & Trust Co.*, 136 U.S. 89 (1890) 11
Leaf Tobacco Bd. of Trade, Ex parte, 222 U.S. 578 (1911) 10

Cases—Continued: Page

Marino v. *Ortiz*, 484 U.S. 301 (1988) 9-10, 15, 16
Mars Steel Corp. v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987) 21
Martin v. *Wilks*, 490 U.S. 755 (1989) 11
Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 29
Minnesota Co. v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609 (1864) 11
NAACP v. *New York*, 413 U.S. 345 (1973) 19
Navigant Consulting, Inc., Sec. Litig., In re, 275 F.3d 616 (7th Cir. 2001) 9, 17
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 8, 9, 21
Peralta v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) 28
Schiavone v. *Fortune*, 477 U.S. 21 (1986) 13
Snell v. *Allianz Life Ins. Co.*, No. Civ. 97-2784, 2000 WL 1336640 (D. Minn. Sept. 8, 2000) 16
Stone Container Corp. v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000), cert. denied, 532 U.S. 971 (2001) 13
Stringfellow v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987) 26
Supreme Tribe of Ben-Hur v. *Cauble*, 255 U.S. 356 (1921) 8
Synthroid Mktg. Litig., In re, 264 F.3d 712 (7th Cir. 2001) 26-27
Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 13
Trbovich v. *United Mine Workers of America*, 404 U.S. 528 (1972) 20
Trustees v. *Greenough*, 105 U.S. 527 (1881) 11
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 6, 7, 15, 19

Cases—Continued: Page

United States v. *AT&T*, 642 F.2d 1285 (D.C. Cir. 1980) 20, 26
United States v. *Chicago*, 908 F.2d 197 (7th Cir. 1990), cert. denied, 498 U.S. 1067 (1991) 26
United States ex rel. Louisiana v. *Jack*, 244 U.S. 397 (1917) 10
West v. *Gibson*, 527 U.S. 212 (1999) 29
West v. *Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424) 12
Williams v. *Morgan*, 111 U.S. 684 (1884) 11
Yniguez v. *Arizona*, 939 F.2d 727 (9th Cir. 1991) 16

Statutes and rules:

Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999) 2, 22
28 U.S.C. 2072(b) 12
29 U.S.C. 1054(g)(1) 2
Fed. R. App. P.:
Rule 3 17
Rule 3(b)(2) 25
Rule 3(c) 17
Fed. R. Civ. P.:
Rule 1 13
Rule 23 ..... *passim*
Advisory committee note 14
Rule 23(a) 8
Rule 23(a)(4) 20
Rule 23(b) 8
Rule 23(b)(1) 3
Rule 23(b)(3) 13
Rule 23(c)(3) 13
Rule 23(d)(2) 13, 14
Advisory committee note 13, 14
Rule 23(d)(3) 13, 14
Advisory committee note 13, 14
Rule 23(e) 3, 4, 19, 21

Rules—Continued: Page

Rule 23(e)(4) 16, 22, 24
Rule 23.1 27
Rule 24 ..... 4, 6, 13, 14, 16, 27
Rule 24(a) 18, 20, 25
Rule 24(a)(2) 7, 13, 14, 18, 20, 25
Advisory committee note 14
Rule 24(c) 26

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Vol. 2 19
Vol. 3 20
Proposed Rules, 201 F.R.D. 586 (2001) 17, 21, 23, 24
S. Rep. No. 98, 104th Cong., 1st Sess. (1995) 22
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Miscellaneous: Page

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Vol. 7B (2d ed. 1986) 13, 14
Vol. 15A (2d ed. 1992) 20

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INTEREST OF THE AMICI

The court of appeals held that a non-named class member who objects to a proposed settlement may not appeal an order approving the settlement unless he intervenes in the action. The federal government is a named party in numerous class actions brought under Federal Rule of Civil Procedure 23, and has a substantial interest in the efficient management and fair disposition of class actions in the federal courts. The Securities and Exchange Commission (SEC) has a particular interest in class actions involving securities claims. Such actions enable investors to obtain redress for violations of the federal securities laws, and supplement the SEC's own enforcement efforts. Recent legislation reflects Congress's concerns over the manner in which securities class actions are conducted, including with respect to the

fairness of settlements reached in such litigation. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999).

STATEMENT

1. Petitioner is a retired member of the Transportation Communications International Union (Union) who receives benefits under the Union's ERISA-governed pension plan. In January 1991, the Union adopted an amendment to the plan recommended by its trustees, adding a cost-of-living adjustment (COLA) to pensions every three years. Pet. App. A4-A5. Later that year, new trustees were selected to administer the plan. The new trustees determined that the COLA adjustments implemented by the 1991 amendment would cost much more than had been forecasted, and rescinded the increases for subsequent retirees. As to individuals (such as petitioner) who already were retired when the COLA payments were implemented in 1991, however, the trustees believed that the pension increases were an "accrued benefit" that, pursuant to 29 U.S.C. 1054(g)(1), could not be decreased. Pet. App. A5.

In January 1995, the new trustees filed suit against the old trustees in the United States District Court for the District of Maryland, claiming that the old trustees had breached their fiduciary duties in approving the 1991 amendment to the plan, and seeking damages and a declaration that that amendment was void. Pet. App. A5. The district court concluded that the old trustees had breached their fiduciary duties in approving the amendment, and that the COLA payments were not accrued benefits from the standpoint of pre-1991 retirees. Shortly after the district court's decision, the new trustees amended the plan in 1997 to rescind the COLA for all members, including those who had retired before the 1991 amendment. *Id.* at A6.

2. In October 1997, the new trustees filed this defendant class action in the District Court for the District of Maryland against union members and retirees in anticipation of challenges to the 1997 amendment. The new trustees sought a declaratory judgment that the amendment was either binding on all plan participants or void as to all such participants. The complaint named petitioner as a class representative because he had been active in challenging efforts to repeal the COLA payments, but petitioner refused to serve as a representative and another retiree was named in his place. Pet. App. A6. The district court conditionally certified the class pursuant to Federal Rule of Civil Procedure Rule 23(b)(1) to facilitate a possible settlement. In May 1999, the parties proposed a settlement under which the 1991 COLA increases would be eliminated in exchange for certain other plan benefits. Pet. App. at A7.

Pursuant to Rule 23(e), notice of the proposed settlement was approved by the district court on September 14, 1999, and sent to the class. J.A. 76-79; see J.A. 49-55. The notice informed class members that a hearing would be held on November 12, 1999, concerning the fairness of the proposed settlement, and that class members were entitled to appear and object to the proposed settlement at that hearing as long as they provided written notice of their intention to do so, along with a brief statement of their objections, by October 18, 1999. J.A. 49-50, 52-53, 77-78.

3. While the Maryland class action was pending, petitioner and several other retirees filed their own suit challenging the 1997 amendment in the United States District Court for the Southern District of New York. That court dismissed petitioner's action and, in April 1999, the Court of Appeals for the Second Circuit affirmed the dismissal, pointing, *inter alia*, to the pending Maryland class action involving the same matter. Pet. App. A7-A8. Shortly thereafter, petitioner sent letters to the district judge in the Maryland

class action requesting to intervene in the action. J.A. 34-46. In September 1999, shortly before the district court approved the Rule 23(e) notice, petitioner, through counsel, formally moved to intervene pursuant to Rule 24. J.A. 56-57. In October 1999, while that motion was pending, petitioner submitted objections to the proposed settlement and notice of his intent to appear at the November fairness hearing. J.A. 104-116. At the fairness hearing, the district court rejected petitioner's intervention motion as untimely and, after considering the objections to the proposed settlement (including petitioner's), found that the settlement was fair and reasonable. Pet. App. A9. At the same time, in denying the objections, the court advised petitioner's counsel, "if I'm wrong, you got an appeal." J.A. 154.

The district court entered a final order approving the settlement, J.A. 172-173, and petitioner appealed.[1]

4. The court of appeals affirmed the denial of petitioner's motion to intervene, and held that he otherwise lacked standing to challenge the class action settlement on appeal. Pet. App. A1-A35. The court held that the district court properly found that petitioner's motion to intervene was untimely, especially in light of his demonstrated "interest in the litigation from the outset of the case." *Id.* at A11. The court also pointed to petitioner's delay in filing his intervention motion "until the settlement negotiations were complete," and agreed with the district court that petitioner's intervention would have prejudiced the parties because the "threat of further delay" and "prospect of complicated

[1] The Maryland district court also entered an order—which is not at issue here—barring petitioner from seeking to bring a collateral attack on the class action settlement. J.A. 170-171. Petitioner appealed that order as well. The court of appeals reversed and remanded that order, Pet. App. A25-A29, and on remand the district court reinstated it, J.A. 174-176.

litigation" created by his intervention "might have unraveled the settlement crafted by the parties." *Id.* at A12-A13.

The court then concluded that, having been properly denied intervention, petitioner should not be permitted to challenge the merits of the class action settlement on appeal. Pet. App. A23-A24. In deciding that petitioner's appeal was impermissible, the court weighed both "class management concerns" and "fairness concerns." *Id.* at A21. Siding with the courts of appeals that have refused to allow such objector appeals in the absence of intervention, the court reasoned that "the need for effective class management and to avoid class fragmentation" outweighs concerns with respect to the fairness of settlements in this context. *Ibid.* The Court explained that "[w]e fail to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representatives and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Ibid.*

Judge Michael concurred in part and concurred in the judgment. Pet. App. A30-A35. He agreed that petitioner's intervention motion was properly denied as untimely. *Id.* at A30, A34. But Judge Michael would have held that "an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." *Id.* at A30. In Judge Michael's view, that approach was supported both by "old equity rules" allowing non-parties to appeal decrees that were binding on them and the need "to encourage fair settlements in class action cases," and would not unduly hamper class management. *Id.* at A31-A32. Judge Michael nevertheless concurred in the judgment because he found that the district court's decision to approve the settlement was "well within its discretion." *Id.* at A35.

SUMMARY OF ARGUMENT

Non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the purpose of taking such an appeal.

A. The general rule is that only persons who are formal parties to a judgment may appeal it. In a line of decisions, however, this Court has held that certain persons, or "quasi parties," who are not named parties to an action may appeal an order in the action if that order binds their interests. *E.g.*, *Blossom* v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863). In certain respects, non-named class members occupy a position similar to that of the quasi parties that this Court allowed to appeal in those cases, especially insofar as such individuals have had some limited involvement in the district court and may be bound by the order that they seek to appeal. In that regard, the Court's quasi party cases support the conclusion that objecting class members should be permitted to appeal class action settlements. Nonetheless, the historical practice with respect to quasi parties does not dispose of the question of the proper procedure an objecting class member must follow in order to pursue an appeal.

B. The Federal Rules of Civil Procedure specify intervention as the mechanism through which non-named class members may enter the action when necessary to protect their interests as active litigants. Indeed, in 1966, Rules 23 and 24 were amended in important respects to make it easier for absent class members to intervene in class actions because of the recognition that such class members may be bound by a judgment governing the class—the same basic concern underlying the Court's quasi party cases. Furthermore, as this Court itself has recognized, "post-judgment intervention for the purpose of appeal" is an established federal practice. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395 (1977). Accordingly, a proper construction of the Federal Rules

leads to the conclusion that objecting class members who seek to enter the action for purposes of appealing a settlement must intervene to do so.

C. An objecting class member who seeks to intervene for the limited purpose of appealing a class action settlement to which he has objected generally will satisfy Federal Rule 24(a)(2)'s criteria and, thus, be entitled to such intervention as of right. An objector typically will be able to demonstrate the requisite interest by showing that he belongs to the settlement class. As this Court has recognized, such a limited-purpose intervention motion is timely as long as it is filed within the time period for appeal. *United Airlines*, 432 U.S. at 396. And in the typical case, objectors may show that their interests are not adequately represented by existing parties by pointing to the fact that the class representative cannot be expected to appeal the very judgment that he requested the district court to approve.

D. Allowing such intervention for the limited purpose of taking an appeal not only squares with the Federal Rules, but also promotes sound class management. Class action dynamics create incentives for those at the helm of the litigation to settle cases on terms that may be favorable to them but inadequate from the standpoint of the class as a whole or certain class members. An appeal by a class member whose objection has been rejected by the district court provides an added check against such abuse by subjecting class settlements to another layer of judicial scrutiny. At the same time, requiring such limited-purpose intervention enables the district court to perform a valuable screening role in assuring that the person seeking to appeal has the interests necessary to enter the case for the purpose of initiating a new phase of the litigation, and to manage the number of class members who should be permitted to intervene to appeal the same settlement on the same grounds. In addition,

the marginal costs of requiring such intervention are minimal from the standpoint of both objectors and the courts.

E. The court of appeals properly rejected the objector appeal in this case. Petitioner was not entitled to appeal without intervening at all. Although petitioner likely would have been entitled to intervene as of right solely for purposes of taking an appeal if he had requested such intervention, he did not argue in the court of appeals that he was entitled to intervene for that limited purpose and has not presented that issue to this Court.

ARGUMENT

A CLASS MEMBER MAY APPEAL A JUDGMENT APPROVING A CLASS ACTION SETTLEMENT OVER HIS OBJECTION BY INTERVENING FOR THE LIMITED PURPOSE OF TAKING SUCH AN APPEAL

Federal Rule of Civil Procedure 23 establishes a unique device—the class action—for the efficient adjudication of controversies involving multiple persons or interests.[2] The Rule permits one or more named "representative parties" to maintain an action on behalf of a class of similarly situated individuals when certain criteria are met, including a showing that the representatives will "fairly and adequately protect the interests" of the class. Fed. R. Civ. P. 23(a) and (b). Under Rule 23, individuals who are members of the class but are not named as representatives occupy an unusual status. Such class members lack control over the conduct of the litigation that is maintained on their behalf by the class representatives. At the same time, however, they may be

[2] As this Court has recognized, the class action device was not invented by the Federal Rules, but instead has roots in the practices of the English courts of equity. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832-833 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (19[illegible]; see also *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366 (1921).

bound by a judgment entered in the action maintained on their behalf. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940).

This case presents the question whether, or in what circumstances, non-named class members who object to a class action settlement may appeal an order approving the settlement. For the reasons explained below, the Court should hold that such class members are required to intervene in the action for purposes of appeal, but that they generally should be entitled to such limited-purpose intervention when they seek it. That approach gives effect both to the historical practice of this Court in allowing persons who are bound and aggrieved by a judgment to appeal it, and provisions of the Federal Rules specifying intervention as the means by which non-named class members may enter the action to protect their interests in a manner that entitles them actually to conduct the litigation, such as by taking an appeal. In addition, this approach promotes sound class management, while accommodating concerns about the fairness of class settlements.[3]

A. This Court's Quasi Party Cases Support Allowing Objecting Class Members To Appeal

1. This Court has long recognized that, as a general matter, persons who are not formal parties to litigation may not appeal orders entered in such litigation. See *Marino* v.

[3] As petitioner has explained (Br. 14-16), there is no constitutional bar to objector appeals in these circumstances. In particular, objecting class members who seek to appeal a class action settlement generally will satisfy the injury and redressability requirements of the Court's constitutional standing doctrine when they are members of the settlement class. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). In that regard, "standing" terminology may be inapt in determining whether objectors may appeal. See *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001).

Ortiz, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well-settled."); see also *Karcher* v. *May*, 484 U.S. 72, 77 (1987); *Auto Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911); *Bayard* v. *Lombard*, 50 U.S. (9 How.) 530, 551 (1850). The orderly resolution of judicial proceedings commands such a rule.

2. As petitioner has explained (Br. 18-22), the Court also has held that, in certain circumstances, persons who are not named parties may appeal an order entered in the case. *Blossom* v. *Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), is a leading example. There, an individual, Blossom, made a bid for property at a court-ordered foreclosure sale. When the sale was suspended, Blossom—who was not a party to the underlying foreclosure action—asked the district court that had ordered the sale to see that the sale was completed. The court refused his request, and Blossom appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the foreclosure action. This Court rejected the railroad's argument, explaining:

> It is certainly true that [Blossom] cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect.

Id. at 655-656. The Court characterized such persons as "quasi parties to the proceedings." *Id.* at 656.

Williams v. *Morgan*, 111 U.S. 684 (1884), is to the same effect. There, the Court held that objectors to trustee charges were "quasi parties" entitled to appeal an adverse decision, even though they were not named parties in the underlying litigation. *Id.* at 698. The Court explained that the objectors "had such an interest [in the charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700. In so holding, the Court pointed to decisions—including *Blossom*—recognizing that such quasi parties should be permitted "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." *Id.* at 699.[4]

3. None of this Court's quasi party cases addresses whether non-named members of a class action, or comparable representative suit, may appeal an order entered in such an action. As petitioner explains (Br. 20), however, in certain respects objecting class members who seek to appeal an order approving a settlement resemble the quasi parties who have been permitted to appeal under this Court's decisions. Such class members may be bound by the order that they seek to appeal, see *Hansberry*, 311 U.S. at 42-43—and, thus, may be "liable to" the order, *Blossom*, 68 U.S. (1 Wall.) at 656—even though they are not named parties. See *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). In addition, insofar as they have been formally notified of an opportunity to object

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[4] See, *e.g.*, *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-634 (1864); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1881); *Hovey* v. *McDonald*, 109 U.S. 150, 155-156 (1883); *Kneeland* v. *American Loan & Trust Co.*, 136 U.S. 89, 94 (1890).

to the proposed settlement and have availed themselves of that opportunity, such class members have been involved in the process resulting in the order that they wish to appeal.[5]

This Court's historical practice with respect to quasi parties accordingly supports the conclusion that a class member who has objected to a proposed class action settlement in the manner provided for by the district court generally should be permitted to appeal an order approving the settlement over his objection. As explained below, however, that practice alone does not dispose of the question presented in this case.

B. The Federal Rules Specify Intervention As The Means By Which Non-Named Class Members May Enter The Action

The Federal Rules of Civil Procedure establish intervention as the mechanism by which non-named class members may enter the action when necessary to protect their interests as active participants in the litigation, including with respect to appeals. Although the Federal Rules should be read in light of the historical practice discussed above, they nonetheless govern the procedures by which federal litigation is conducted. See 28 U.S.C. 2072(b).

1. A Rule of the Federal Rules of Civil Procedure, like a Rule of Criminal Procedure, is "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to

[5] The analogy between non-named class members and the quasi parties of this Court's decisions is supported by other evidence. Justice Story, for example, recognized the rights of members in representative suits to appear in court "as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeopardied." *West* v. *Randall*, 29 F. Cas. 718, 722-723 (C.C.D.R.I. 1820) (No. 17,424); see also J. Story, *Commentaries on Equity Pleadings* § 409, at 353 (9th ed. 1879).

disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988); see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988); *Stone Container Corp.* v. *United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000), cert. denied, 532 U.S. 971 (2001). Accordingly, this Court gives effect to the "plain meaning" of the Federal Rules, as construed in light of their purpose and design. *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986); see *Becker* v. *Montgomery*, 121 S. Ct. 1801, 1806 (2001); Fed. R. Civ. P. 1. In construing the Rules, the Court also gives "weight" to the Advisory Committee Notes accompanying them. See *Torres*, 487 U.S. at 315-316; *Schiavone*, 477 U.S. at 30-31.

Federal Rules 23 and 24 specifically contemplate that non-named class members may formally enter the action through intervention, when necessary to protect their interests.[6] Rule 23(d)(2) provides that courts may order that notice be given to absent class members advising them of their right "to intervene and present claims or defenses, or otherwise to come into the action." In addition, Rule 23(d)(3) authorizes courts to impose "conditions on the representative parties or on intervenors." At the same time, Rule 24(a)(2) permits intervention as of right when the applicant shows that his interests are not being adequately represented by "existing parties," and the Advisory Committee Note to the 1966 amendment adding Rule 24(a)(2) makes clear that it was intended to protect the interests of non-named class members in particular. See also 7B C. Wright, et al., *Federal Practice and Procedure: Civil* § 1799, at 437 (2d ed. 1986).

[6] Members of classes certified pursuant to Rule 23(b)(3) enjoy an alternative option: they may opt out of the litigation altogether. See Fed. R. Civ. P. 23(c)(3). The class action in this case, however, was not certified pursuant to Rule 23(b)(3).

The evolution of Rules 23 and 24 is similarly telling. As originally adopted, Rule 23 did not mention intervention. The references to intervention were added in 1966, the same year that subsection (a)(2) was added to Rule 24. The Advisory Committee Note to the 1966 amendment to Rule 23 explains that the provision in subsection (d)(2) for notice to class members was intended to "encourage interventions to improve the representation of the class." In the same vein, the note to the 1966 amendment to Rule 24(a)(2) states: "A class member who claims that his 'representative' does not adequately represent him * * * should not be put to the risk of having a judgment entered in the action which by its terms extends to him * * *. Rather, he should, as a general rule, be entitled to intervene." In other words, the 1966 amendments to Rules 23 and 24 not only were designed to facilitate intervention in class actions, but they were motivated by the same concern driving the quasi party cases discussed above—*i.e.*, that absent class members would be bound by the judgment, even though they were not named parties. See 7B C. Wright, et al., *supra*, § 1799, at 437.

2. The fact that non-named class members seek to enter the action for purposes of appeal does not make intervention either unavailable or unnecessary. The Federal Rules clearly contemplate intervention for limited purposes such as appeal. For example, Rule 23(d)(3) authorizes the court to place "conditions * * * on intervenors," and the accompanying Advisory Committee Note states that "imposition of conditions on intervenors may be required for the proper and efficient conduct of the litigation." Likewise, the Advisory Committee Note to Rule 24(a)(2) states that "intervention of right under [this] rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Furthermore, intervention limited to appeal is an established federal practice. See 6 *Moore's Federal Practice*

§ 24.24[3], at 24-99 (D. Coquillette, et al., eds., 3d ed. 1997); 26 *Federal Procedure, Lawyers Edition* § 59:402, at 293 (1984).[7]

This Court itself has recognized that form of intervention practice. For example, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), a non-named member of a putative plaintiff class moved to intervene in the action shortly after the district court entered a final judgment denying class certification. The district court denied that intervention motion on the ground that it was untimely. This Court disagreed, pointing out that the motion was "filed * * * within the time period in which the named plaintiffs could have taken an appeal." *Id.* at 396. The Court further observed that its ruling was "consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal." *Id.* at 395-396 & n.16 (citing cases).

Marino v. *Ortiz*, *supra*, is also instructive. That case involved a class action brought by groups representing minority police officers who had challenged certain employment practices. The action was settled by a consent decree. Prior to the approval of the consent decree a group of non-minority police officers—who were not members of the minority class—presented objections to the proposed settlement at a hearing. After the consent decree was approved, the objectors sought to appeal it. This Court held that "because [the appellants] were not parties to the underlying lawsuit, * * * they may not appeal from the consent decree ap-

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[7] Indeed, intervention for purposes of appeal may be one of the *oldest* forms of intervention practice. See J. Moore, *Federal Intervention*, 45 Yale L.J. 565, 568 (1936) ("[I]ntervention practice in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner's interest thus be inadequately protected.").

proving that lawsuit's settlement." 484 U.S. at 304. Citing *United Airlines*, the Court added that "the better practice is for such * * * nonpart[ies] to seek intervention for purposes of appeal," which the objectors had not done. *Ibid.*[8]

To be sure, as the court of appeals in this case recognized, not all courts have required objecting class members to intervene as a prerequisite to appealing an order approving a class action settlement. See Pet. App. A15-A17. In particular, some courts—like the dissent below—have reasoned that objectors should be permitted to appeal without having to intervene because they may be bound by the judgment, and because objector appeals help police against unfair settlements. See *id.* at A31-A32. That approach, however, fails to account for the intervention procedure spelled out in Federal Rules 23 and 24 for non-named class members who seek to enter the action, and the federal practice of intervention for the limited purpose of taking an appeal. Moreover, as explained below (pp. 21-23, *supra*), policy concerns supporting appellate review of class action settlements are fully accommodated by intervention under Rule 24 for the purpose of appeal.[9]

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[8] Numerous other decisions also recognize the practice of granting intervention for the limited purpose of taking an appeal. See, *e.g.*, *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980); *Alaska* v. *Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997); *Yniguez* v. *Arizona*, 939 F.2d 727 (9th Cir. 1991); *Baker* v. *Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); see also *Snell* v. *Allianz Life Ins. Co.*, No. Civ. 97-2784, 2000 WL 1336140, at *10 (D. Minn. Sept. 8, 2000) (objecting class members may intervene, but solely for purpose of appeal); 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99 (citing cases).

[9] The Rules Advisory Committee recently discussed the case law in this area in commenting on its proposed amendment to Federal Rule 23(e)(4), which would guarantee the right of class members to object to a proposed settlement. The Committee stated: "A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if

3. The Seventh Circuit has reasoned that objecting class members must intervene to appeal on the ground that "Appellate Rule 3 limits appeals to parties." *Navigant*, 275 F.3d at 619. In response, petitioner argues (Br. 17 & n.5) that such class members *are* parties within the meaning of Rule 3 and, therefore, are entitled to appeal. Appellate Rule 3, however, does not grant any right of appeal; it merely governs the "Contents of the Notice of Appeal." Fed. R. App. P. 3(c). As a result, even assuming non-named (and non-intervenor) class members are "parties" within the meaning of Rule 3(c), that Rule would not entitle them to appeal. More to the point, nothing in Appellate Rule 3(c)—or its simple notice requirement—supersedes the intervention mechanism established by the Civil Rules. In deciding this case, the Court should give effect both to the Appellate Rules *and* the Civil Rules by holding that objecting class members are required to intervene for the purpose of appealing a class action settlement, and that objectors who do so must be specified in the notice of appeal.

Amicus Council of Institutional Investors (CII) contends (Br. 12-13) that "[i]t would be at odds with the design of the Federal Rules to absolve class members from intervening for purposes of raising objections in district court but then require them to intervene * * * simply to afford 'standing' in a *court of appeals*." There is a wide gulf, however, between submitting objections that a court may consider in deciding whether to approve a proposed settlement, and taking hold of the reins of a case to press it forward into the court of appeals. In the former situation, the class member

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the objector has won intervention in the district court. An objector who wishes to preserve the opportunity to appeal is well advised to seek intervention." *Proposed Rules*, 201 F.R.D. 586, 629 (2001) (citation omitted). The Advisory Committee has not proposed any amendment that would alter the intervention mechanism discussed above, or otherwise resolve the question presented here.

is simply providing his input on a question placed before the court by the litigating parties (*i.e.*, the reasonableness of the settlement), while in the latter situation he is actually controlling the course of the litigation.

C. In The Typical Case, An Objecting Class Member Will Be Entitled To Intervene For The Limited Purpose Of Taking An Appeal

The Federal Rules provide for intervention as of right "upon timely application * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). As a general matter, a class member who seeks to intervene to appeal a judgment approving a settlement to which he filed a timely objection will satisfy Rule 24(a)'s interest, timeliness, and inadequate representation requirements and, thus, be entitled to intervene for that limited purpose.

1. Objectors may establish the requisite interest in the action by showing that they belong to the settlement class and thus would be bound by judgment approving the settlement. The members of a plaintiff class action typically have claims for damages or other relief that will be compromised by the settlement. In a defendant class action, settlement may require class members actually to forfeit certain rights or claims. Moreover, as discussed above (at 11), in both types of class actions, the settlement generally is binding on class members and may preclude them from seeking damages or other relief in a subsequent action with respect to any claims adjudicated by the class action.

2. As this Court recognized in *United Airlines*, the "critical inquiry" in determining whether to allow "post-judgment

intervention for the purpose of appeal * * * is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." 432 U.S. at 395-396 (citing *NAACP* v. *New York*, 413 U.S. 345, 366 (1973)). The Court further held that, because the intervention motion in that case was filed "within the time period in which the named plaintiffs could have taken an appeal," it was "timely filed." *Id.* at 396; see 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99. That rule provides a familiar and readily administrable benchmark to establish the timeliness of an objector's request to intervene for the limited purpose of appeal, and it may be easily met by objectors who wish to take an appeal.

An objector should not be required to intervene *prior to* judgment. Rule 23(e) requires that notice be provided to class members in the event of a proposed settlement, and the practice is to permit class members entitled to such notice an opportunity to object to a proposed settlement before it is approved. See 2 H. Newberg, et al., *Newberg on Class Actions* § 11.55, at 11-132 (3d ed. 1992); J.A. 78-79. The ability to present such objections affords non-named class members an opportunity to voice their views on a proposed settlement in a relatively informal manner, without hiring counsel or intervening. If the court modifies the settlement in response to such objections, or if the court sufficiently explains its reasons for not doing so, the need for an appeal may be obviated altogether. Judicial economy would be ill-served by requiring class members to file prospective motions to intervene simply to preserve their right to appeal in the event a settlement is approved. Cf. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 560-561 (1974).[10]

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[10] Class members who seek to intervene for purposes other than simply to appeal, such as to obtain discovery or participate directly in the settlement, typically are required to intervene earlier in the proceedings.

3. This Court has stated that Rule 24(a)'s third criterion is "satisfied if the applicant shows that representation of his interest 'may be' inadequate," and that "the burden of making that showing should be treated as minimal." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972); see 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99. Inadequate representation will invariably be present when a class member seeks to appeal a judgment approving a class action settlement over his objection, because once the settlement is approved, the class representative's interest will be in preserving the settlement and, thus, in *avoiding* an appeal. See *Associated Builders & Contractors* v. *Perry*, 115 F.3d 386, 391 (6th Cir. 1997); *Edwards* v. *City of Houston*, 37 F.3d 1097, 1108 (5th Cir. 1994); *United States* v. *AT&T*, 642 F.2d 1285, 1294 (D.C. Cir. 1980); 15A C. Wright, et al., *supra*, § 3902.1, at 111 (2d ed. 1992) ("[T]he failure of any other party to appeal would virtually compel the conclusion that the intervenor's interests were not adequately represented.").

In addition, whereas Rule 23(a)(4) requires a representative party to establish that he "will fairly and adequately protect the interests *of the class*" (emphasis added), Rule 24(a)(2) looks only to whether "the *applicant's* interest is adequately represented by existing parties" (emphasis added). As a result, in seeking limited-purpose intervention to appeal, an objector need not show that he is an adequate

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See *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-458 (7th Cir. 1997) (citing examples); 3 H. Newberg, et al., *supra*, § 16.06, at 16-31. In addition, because of the significant practical concerns created by having multiple litigating parties in a class action, putative class members are often denied such intervention. See *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 n.4 (1983). For example, in the settlement context, a non-named class member might seek to intervene to play the role of a spoiler. See p. 26, *infra*. Accordingly, district courts have a great deal more discretion in deciding whether to allow such class members to intervene before any settlement is approved by the court.

representative for other members of the class, or the class as a whole. Nor is he required to disturb any prior finding that the class was adequately represented prior to judgment. The objector need only show that his *own* interests will not be fairly represented *on appeal*, a showing that in most cases may be made simply by pointing to the class representative's interest in forgoing an appeal.

D. The Intervention Procedure Promotes Both Fairness And Efficiency

The foregoing approach not only squares with a plain reading of the Federal Rules, but also advances sound class management.

1. As petitioner (Br. 33-35) and his amici (see CII Br. 17-18) explain, objector appeals provide an important check against unfair class action settlements. The class representative may agree to terms or strike a balance in the settlement that some class members regard as inadequate or unfair. In addition, many class actions are lawyer-driven, in that the named plaintiffs are selected by a lawyer and non-named class members "have individually too little at stake to spend time monitoring the lawyer." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987); see J. Macey & J. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3 (1991). And class action lawyers may agree to settlements that are inadequate from the standpoint of the class, because of the prospect of the attorney's fees that would flow from a settlement. See *Ortiz*, 527 U.S. at 852; J. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 232 (1983).

Rule 23(e) itself furnishes some protection to absent class members against unfair settlements by providing that class

actions may not be settled without the approval of the court, and that prior notice of the proposed settlement must be given to class members. In addition, the well-settled practice—followed by the district court in this case—is for courts to permit non-named class members to submit objections to a proposed settlement and present such objections at a fairness hearing on the settlement. Nonetheless, there is widespread agreement that increased scrutiny is needed in reviewing class action settlements and, indeed, the Advisory Committee has recently proposed amendments to Rule 23 "to strengthen the process of reviewing proposed class-action settlements." 201 F.R.D. at 617 (Note to Proposed Rule 23(e)).[11]

Objecting class members serve an important role in ensuring that a proposed settlement is tested before it is approved. In particular, because of their direct familiarity with their own claims or grievances, objectors are often in a position to alert courts to the disadvantages or potential improprieties of a proposed settlement. See *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993). As the Advisory Committee recently observed in discussing its proposed amendment to Rule 23(e)(4), which would confirm the right of class members to object to a proposed settlement, an objector might argue that he should not be included in the class definition, or is entitled to different settlement terms.

[11] Congress itself has specified procedures for the appointment of lead plaintiffs and counsel in securities class actions. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999). That Act was motivated by concerns that some lawyers in these actions have engaged in abusive litigation practices, and "often receive a disproportionate share of settlement awards." H.R. Rep. No. 369, 104th Cong., 1st Sess. 36 (1995); see S. Rep. No. 98, 104th Cong., 1st Sess. 6, 12 (1995); H.R. Rep. No. 50, 104th Cong., 1st Sess. 17 (1995). The Act, however, is limited to the securities context, and in any event does not provide complete protection against inappropriate class action settlements.

201 F.R.D. at 628. In other circumstances, the objector might raise broader concerns. Such "objections may be the only means available to provide strong adversary challenges to the reasonableness of the settlement—the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts." *Id.* at 629.

Allowing such objectors to intervene for the limited purpose of appealing a settlement that is approved by the district court provides an additional safeguard by ensuring that judgments approving such settlements are subjected to appellate scrutiny. The need for that safeguard is bolstered by evidence that the vast majority of settlements reached in class actions ultimately are approved by district courts. See Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts* 58 (1996) ("Approximately 90% or more of the proposed settlements were approved without changes in each of the four districts.").

2. At the same time, requiring intervention as a prerequisite to appeal promotes efficient class management. See *American Pipe*, 414 U.S. at 553 ("efficiency and economy of litigation * * * is a principal purpose of the [class action] procedure"); accord *Chardon* v. *Soto* 462 U.S. 650, 660 (1983); *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 155 (1982). In particular, requiring objectors to move for limited intervention in the district court—instead of permitting them to go directly to the court of appeals—permits district courts to perform an important screening function.

Even when it is limited in nature, an intervention motion provides the district court with an opportunity to confirm an objector's interest in pursuing an appeal, and to evaluate any opposition that is made to intervention. For example, after the filing of an opposition to such a motion, a court might determine that an objector seeking intervention in fact does not fit within the definition of the settlement class, or

otherwise is not entitled to relief in the class action, perhaps because he obtained redress in some other manner. In addition, an objector might seek to intervene for the purpose of appealing an objection that he did not present in a timely manner to the district court, or that the court resolved in the objector's favor in approving the settlement.[12]

District courts are much better suited than appellate courts to consider such issues in the first instance because of their first-hand knowledge of the litigation and ability to engage in any necessary fact-finding. Furthermore, efficiency in both class management and appellate review is advanced by resolving such issues in the district court before a potentially improper appeal is launched. Indeed, in some cases, a district court's denial of an intervention motion may obviate the need for appellate proceedings and, thus, bring finality to a class action settlement that otherwise might be kept in limbo while a single objector takes an appeal. "Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries." 201 F.R.D. at 630 (Note to Proposed Rule 23(e)(4)). In other cases, district court consideration of an intervention motion may result in a more concrete factual record for the court of appeals.

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[12] As the Advisory Committee has observed, "[c]lass settlements at times have been accompanied by separate agreements or understandings." 201 F.R.D. at 623 (Note to Proposed Rule 23(e)). Class members may surrender "objections in return for benefits that would not be available to the objector under the settlement terms available to other class members." *Id.* at 631 (Note to Proposed Rule 23(e)(3)). The existence of such side agreements or terms—whatever their merit or impact on other class members—could eliminate the objector's legitimate interest in appealing. See, *e.g.*, *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999).

In addition, if numerous requests for intervention are made by objectors seeking to appeal the same class action settlement, a district court could conclude that intervention is inappropriate with respect to objectors who seek to intervene to raise on appeal the same arguments that are going to be pressed by objectors who already have intervened for purposes of appeal. See Fed. R. Civ. P. 24(a)(2); see also *Guthrie* v. *Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (allowing multiple appeals by individual class members "could become unwieldy" and "defeat the very purpose of class action lawsuits"). Although courts of appeals have authority to consolidate duplicative appeals, see Fed. R. App. P. 3(b)(2), district courts typically will occupy a superior vantage point from which to make that determination based on their own familiarity with the case and its actors.

3. Requiring limited-purpose intervention also will impose minimal added costs on district courts and objectors. As a general matter, district courts will have little difficulty in processing such intervention motions because, as discussed above, in the ordinary case it will be evident from the face of the papers that the movant satisfies the criteria for intervention as of right pursuant to Rule 24(a). Nor is there any reason to believe that district courts will be overburdened with such motions because, as both petitioner (Br. 32) and amicus CII (Br. 21) point out, in practice relatively few objectors elect to press appeals.

From the standpoint of objectors, the marginal costs of limited-purpose intervention are also slight. By the time such motions are due (*i.e.*, post-judgment), the objector already will have reviewed the proposed settlement; submitted objections and perhaps appeared at the fairness hearing; evaluated the settlement approved by the court; made a decision to challenge the settlement on appeal; and likely retained counsel along the way. To intervene for the limited purpose of appealing, the objector need only submit a motion

explaining the grounds for intervention and notice pleading stating his claims or defenses. Fed. R. Civ. P. 24(c). As Form 23 of the Civil Rules illustrates, such filing may be brief, and an objector who already has submitted objections and is gearing up for an appeal can easily prepare such a paper.

Petitioner (Br. 39) and amicus CII (Br. 19-20) suggest that requiring intervention would subject objectors to burdensome discovery. As discussed above, however, the Federal Rules permit courts to place conditions on the scope of intervention, and that includes restrictions on discovery. See *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *AT&T*, 642 F.2d at 1293; 6 *Moore's Federal Practice*, *supra*, § 24.23[1], at 24-86. More to the point, intervention for the limited purpose of appeal by its terms does not entail intervention for purposes of discovery. Accordingly, any non-named class member who seeks discovery may be required to intervene prior to approval of any proposed settlement, and face greater demands in showing that he should be allowed to intervene. Likewise, objectors who seek intervention for purposes of appeal should not face discovery demands by others, except as may be necessary to confirm their fitness to intervene for that purpose. See p. 24, *supra*.

Nor would requiring such limited-purpose intervention play into the hands of "spoiler[s]." Pet. App. A23; see *United States* v. *Chicago*, 908 F.2d 197, 199 (7th Cir. 1990) ("Litigation will have no end if every time parties resolve amicably (or drop) a point of contention, someone else intervenes to keep the ball in the air."), cert. denied, 498 U.S. 1067 (1991). Objectors who seek to intervene in order to "block the settlement by withholding agreement to its terms," or to frustrate the settlement process by imposing burdensome discovery requests, will not be aided by a rule that allows them to intervene for the sole purpose of taking an appeal.

In re Synthroid Mktg. Litig., 264 F.3d 712, 715 (7th Cir. 2001); see *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). As noted above, district courts have much greater discretion in determining whether to allow pre-judgment intervention during the settlement process.[13]

E. The Court Of Appeals Properly Rejected Petitioner's Appeal In This Case

Petitioner's central argument in this Court is that he was entitled to appeal without having to intervene. That argument should be rejected for the reasons discussed above. In the alternative, petitioner briefly argues (Br. 13) that, "if intervention *is* required, the district court erred in refusing to permit petitioner to intervene limited to the right to con-

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[13] In *California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999) (per curiam), this Court considered whether a shareholder who objects to a proposed settlement in a derivative action brought under Rule 23.1 may appeal an order approving the settlement without intervening in the action. The Court affirmed by an equally divided vote without issuing any opinion. In *Felzen*, the federal government took the position that intervention was not required to appeal in those circumstances, pointing, *inter alia*, to the Court's quasi party cases and the role played by appeals in policing unfair settlements. See Br. for Amici U.S. & SEC in *Felzen* at 5-24, *Felzen*, *supra*. The government also stated that "judicial administration is ill-served by requiring absent class members or shareholders to submit formal intervention motions simply to preserve their right to appeal a settlement that has *yet to be* proposed or accepted." *Id.* at 25 n.19 (emphasis added). The government alternatively argued that, if intervention was required, it should be "routinely granted" for the limited purpose of appeal. *Id.* at 28 n.23 (citing *Bryant*, 447 U.S. at 366). On further consideration, the United States and the SEC have concluded that the Court should hold that such limited-purpose intervention is required in answering the question presented here. The approach discussed above will promote the same policy considerations that the government discussed in *Felzen*, while giving effect to the clear design of Federal Rules 23 and 24.

test and subsequently appeal the settlement." See Pet. Br. 41-42. That argument also does not afford a basis for reversal.

Petitioner acknowledges (Br. 6) that he sought to intervene not only to move to oppose the preliminary approval of the settlement, but also to take discovery, secure an injunction, and disqualify class counsel. J.A. 56. As noted above, when parties seek to intervene to participate in the settlement process itself, or otherwise to participate actively as a litigant in the district court, they face greater demands in showing that their motion is timely and that they otherwise are entitled to intervene. In addition, the policy considerations are different in that context, because of legitimate concerns that such intervenor-objectors will act as spoilers. The record in this case firmly supports the denial of petitioner's motion to intervene on the terms petitioner sought. See Pet. App. A10-A14; see also *id.* at A12.

The record indicates that petitioner likely would have been entitled to intervene if he had requested intervention for the limited purpose of appealing the class action settlement. See Part C, *supra*. For at least two reasons, however, it does not appear that reversal of the court of appeals' judgment would be appropriate on the ground that petitioner was entitled to such intervention. First, although petitioner challenged the denial of his motion for full intervention, he did not argue in the court of appeals that he should have been permitted to intervene for the limited purpose of taking an appeal. As a result, the court of appeals did not address that issue. See Pet. App. A10-A14, A30. This Court's practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988).

Second, petitioner has not properly presented the issue to this Court. Petitioner framed the sole question presented in terms of whether a class member has "standing to appeal"

when "he objects and moves to intervene," without reference to whether intervention is granted or denied. Pet. i. Petitioner did not present the distinct question whether the court of appeals properly affirmed the denial of his motion to intervene. Pet. App. A10-A14; see *West* v. *Gibson*, 527 U.S. 212, 223 (1999) (declining to address "alternative grounds" that "fall outside the scope of the question presented"); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). To be sure, the body of the petition (at 13) briefly discussed recent Seventh Circuit decisions adopting a limited-purpose intervention approach. But the petition acknowledged (*ibid.*) that those decisions would permit him to appeal "on a different basis" than the decisions of other courts that have permitted appeals without regard to whether the objecting class member was allowed to intervene. See also Pet. Reply Br. 7-9. And even in his merits brief (at 41-42), petitioner is unclear as to the scope of the limited intervention that he claims that the courts below should have granted him.

If the Court concludes that this argument is fairly included within the question presented, but is unable to determine whether the argument was properly raised below, the Court should vacate the judgment below and remand the case to the court of appeals for further consideration of that matter. See *West*, 527 U.S. at 223.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

ROBERT J. DEVLIN, Petitioner,

v.

ROBERT A. SCARDELLETTI, *et al.*, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a class member who, pursuant to Federal Rule of Civil Procedure 23, receives notice of a proposed class action settlement from a federal district court and objects to the settlement in that court must intervene pursuant to Federal Rule of Civil Procedure 24 solely in order to appeal an adverse decision on the merits of his or her objection.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. INTERVENTION IS NOT REQUIRED FOR A RULE 23 SETTLEMENT OBJECTOR TO APPEAL 4

A. The Federal Rules and This Court's Precedents Authorize Appeals by Rule 23 Settlement Objectors 4

B. There Are No Constitutional, Statutory, or Case Law Impediments to Rule 23 Objector Appeals 13

II. THE FOURTH CIRCUIT'S POLICY-BASED RATIONALE FOR REQUIRING INTERVENTION IS LEGALLY INSUFFICIENT AND CANNOT WITHSTAND SCRUTINY ON ITS OWN TERMS 17

III. RULE 23.1 OBJECTORS SHOULD ALSO BE PERMITTED TO APPEAL 23

IV. AT A MINIMUM, THE COURT SHOULD MAKE INTERVENTION A PRACTICAL POSSIBILITY FOR OBJECTORS 27

CONCLUSION 30

APPENDIX:
Fed. Rule Civ. P. 23 ..... A-1
Fed. Rule Civ. P. 23.1 ..... A-5
Fed. Rule Civ. P. 24 ..... A-6

TABLE OF AUTHORITIES

CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 3, 10, 18, 22

Angoff v. Goldfine,
270 F.2d 185 (1st Cir. 1959) 9

Bayard v. Lombard,
50 U.S. (9 How.) 530 (1850) 9, 16

Bell Atlantic Corp. v. Bolger,
2 F.3d 1304 (3rd Cir. 1993) 14, 17, 18, 19

Blossom v. Milwaukee R.R.,
68 U.S. (1 Wall.) 655 (1863) 7, 8, 15, 16

CalPERS v. Felzen,
525 U.S. 315 (1999) 2

Christian v. R. Hoe & Co.,
63 F.2d 218 (2d Cir. 1933) 25

Ex Parte Cockcroft,
104 U.S. 578 (1882) 9, 16

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 24, 25

Cohen v. Young,
127 F.2d 721 (6th Cir. 1942) 18

Connor v. Peugh's Lessee,
59 U.S. (18 How.) 394 (1856) 16

Crawford v. Equifax Payment Servs., Inc.,
201 F.3d 877 (7th Cir. 2000) 27, 28

Cunningham v. English,
269 F.2d 539 (D.C. Cir. 1959) 25

Ex parte Cutting,
94 U.S. 14 (1876) 16

Daily Income Fund, Inc. v. Fox,
464 U.S. 523 (1984) 18

Dietrich Corp. v. King Resources Co.,
596 F.2d 422 (10th Cir. 1979) 9

Felzen v. Andreas,
134 F.3d 873 (7th Cir. 1998) ..... passim

Ficalora v. Lockheed California Co.,
751 F.2d 995 (9th Cir. 1985) 22

Holmes v. Continental Can Co.,
706 F.2d 1144 (11th Cir. 1983) 22

Fields v. Blum,
629 F.2d 825 (2d Cir. 1980) 9

Flinn v. FMC Corp.,
528 F.2d 1169 (4th Cir. 1975),
cert. denied, 424 U.S. 967 (1976) 5

General Ins. Co. of Am. v. Eastern Consol. Utils., Inc.,
126 F.3d 215 (3rd Cir. 1997) 9

In re General Tire & Rubber Co. Sec. Litig.,
726 F.2d 1075 (6th Cir.),
cert denied, 469 U.S. 858 (1984) 11

Gould v. Alleco, Inc.,
883 F.2d 281 (4th Cir. 1989)
cert. denied, 493 U.S. 1058 (1990) 5

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55 F.3d 768 (3d Cir. 1995),
cert. denied, 516 U.S. 824 (1996) 22

Hansberry v. Lee, 311 U.S. 32 (1940 6

Hawes v. City of Oakland,
104 U.S. (14 Otto) 450 (1881) 23, 25

Hinckley v. Gilman, Clinton & Springfield R.R. Co.,
94 U.S. 467 (1877) 8

Hovey v. McDonald,
109 U.S. (14 Otto) 150 (1883) 8

James v. Home Constr. Co. of Mobile, Inc.,
689 F.2d 1357 (11th Cir. 1982) 9

Johnson v. Manhattan Ry.,
289 U.S. 479 (1933) 25

Kaplan v. Rand,
192 F.3d 60 (2d Cir. 1999) ..... passim

Karcher v. May,
484 U.S. 72 (1987) 16

Ex parte Leaf Tobacco Bd. of Trade of the City of New York,
222 U.S. 578 (1911) 16

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643 F.2d 319 (5th Cir. 1981) 9

Marino v. Ortiz,
484 U.S. 301 (1988) ..... passim

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226 F.3d 35 (1st Cir. 2000) 16

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69 U.S. (2 Wall.) 609 (1864) 8

In re Navigant Consulting, Inc. Sec. Litig.,
No. 01-2311, 2001 U.S. App. LEXIS 27164
(7th Cir. Dec. 26, 2001) ..... passim

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199 F.3d 507 (D.C. Cir. 2000) 11

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Brown's Parliamentary Cases 20 (1721) 7

Payne v. Niles,
61 U.S. (20 How.) 219 (1858) 16

Petersen v. Douglas County Bank & Trust Co.,
967 F.2d 1186 (8th Cir. 1992) 9

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 5

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 5

In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.,
543 F.2d 1058 (3rd Cir. 1976) 24

Port Drum Co. v. Umphrey,
852 F.2d 148 (5th Cir. 1988) 9

Preston v. United States,
284 F.2d 514 (9th Cir. 1960) 9

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690 F.2d 98 (6th Cir. 1982) 9

Ragsdale v. Turnock,
941 F.2d 501 (7th Cir. 1991) 27, 28

Rosenbaum v. MacAllister,
64 F.3d 1439 (10th Cir. 1995) 18, 22, 26

Sage v. Railroad Co.,
96 U.S. 712 (1877) 8

Sam Fox Publ'g Co. v. United States,
366 U.S. 683 (1961) 11

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57 U.S (16 How.) 288 (1850) 6

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255 U.S. 356 (1921) 6

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264 F.3d 712 (7th Cir. 2001) 27

Trustees v. Greenough,
105 U.S. 527 (1881) 8

Tryforos v. Icarian Dev. Co.,
518 F.2d 1258 (7th Cir. 1975)
overruled by Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998),
aff'd by an equally divided Court, 525 U.S. 315 (1999) 26

United States v. Bertoli,
994 F.2d 1002 (3rd Cir. 1993),
cert. denied, 510 U.S. 820 (1993) 9

United States v. Carter,
530 U.S. 255 (2000) 6, 7

United States Catholic Conference v. Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) 9

United States ex rel. Louisiana v. Jack,
244 U.S. 397 (1917) 14

United States v. LTV Corp.,
746 F.2d 51 (D.C. Cir. 1984) 24

United States v. Tippett,
975 F.2d 713 (10th Cir. 1992) 9

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991 F. Supp. 1193 (N.D. Cal. 1998) 1

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101 F.R.D. 461 (D. Del. 1984) 21

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70 F.2d 621 (2d Cir. 1934) 10

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29 Fed. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424) 6

Williams v. Morgan,
111 U.S. 684 (1884) 8

Zucker v. Westinghouse Elec. Corp.,
265 F.3d 171 (3rd Cir. 2001) 19, 22

STATUTES AND RULES

15 U.S.C. § 78u-4(a)(3)(A)(i) 20

28 U.S.C. § 1291 ..... 5, 15

Fed. Rule App. P.:
Rule 1(b) 15
Rule 3(c) 14, 15, 21

Fed. Rule Civ. P.:
Rule 23 ..... passim
Rule 23.1 ..... passim
Rule 24 ..... passim

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INTEREST OF THE *AMICUS CURIAE*[1]

The Council of Institutional Investors (the "Council") is an organization of public, Taft-Hartley, and corporate pension funds with over 120 members whose combined assets exceed $1.5 trillion. The Council is recognized as a significant voice for investors on issues of corporate governance, executive compensation, and corporate accountability to shareholders. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998). The Council has been a leading proponent of meaningful shareholder participation in major decisions that affect corporate viability.

In the 1995 Private Securities Litigation Reform Act ("PSLRA"), Congress recognized that the Council's institutional shareholder members, with their large holdings in many of the country's leading companies, are especially well-positioned to represent the interests of absent class members in many class action disputes, and to prevent the collusion that frequently occurs between defendants and plaintiffs' attorneys in settling such cases. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (explaining that "[t]he Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"; decrying the fact that the "current system often works to prevent institutional shareholders" from participating in class actions; and stating that "the Conference Committee seeks to increase the likelihood that institutional investors will" participate by, *inter alia*, providing sufficiently long notice periods to enable institutional

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[1]Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party had any role in authoring this brief, and no persons or entities other than *amicus* made any monetary contribution to its preparation or submission. Pursuant to Rule 37.3, written consent letters from the parties to the filing of this brief are on file with the Clerk of the Court.

shareholders time to convene their boards and decide whether to participate).

The interests of the Council and its members are directly implicated by this case. Two of the Council's members, the California Public Employees' Retirement System ("CalPERS") and the Florida State Board of Administration, fought to preserve objector appellate rights in *CalPERS v. Felzen*, 525 U.S. 315 (1999), and the Council participated as an *amicus curiae*. An affirmance in this case would erect a substantial and unnecessary barrier to participation by objecting institutional shareholders in the review of proposed settlements in class action disputes where their participation is most needed.

SUMMARY OF ARGUMENT

I. The Federal Rules of Civil Procedure ("FRCP") permit objecting class members to appear and object to proposed class-wide settlements in district court proceedings without intervening as parties. Nothing in the Constitution, federal statutes governing appellate jurisdiction, or the Federal Rules of Appellate Procedure ("FRAP") require settlement objectors to intervene simply to take an appeal.

Nor is there any other legal basis for imposing such a requirement. Prior decisions by this Court recognize that all class members *are* parties in interest to a FRCP 23 proceeding. Even (erroneously) presuming that objecting class members are not parties, non-party appeals are common in the federal system and this Court has established a test for determining whether non-parties qualify for appeal, turning on whether: (i) they received notice and an opportunity to be heard in district court proceedings; (ii) they are aggrieved by the district court's rulings; and (iii) they are forbidden by operation of claim or issue preclusion from relitigating their individual claims. Objecting class members meet all of these tests.

II. The Fourth Circuit grounded its decision not on legal principles, but on the *policy* judgment that the federal courts would be overworked without an intervention requirement. Even if such judicial law-making were appropriate, the Fourth Circuit acted without "*any evidence*" suggesting that objector appeals have presented manageability problems in the circuits where they are permitted. Pet. App. A32 (Michael, J., dissenting).

The Fourth Circuit's policy analysis also ignores the fact that an objector appeal provides one of the few checks in a settlement process that otherwise tends toward collusion between class counsel and corporate defendants. When courts of appeals do entertain objector appeals, the result is frequently the rejection or revision of settlements that offer insufficient value for class members; this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is but one recent example among many.

III. Rule 23.1 derivative suit objectors are as much parties in interest as Rule 23 class members. They also fulfill all of the preconditions for non-party appeals. They receive written notice of any settlement, they have an opportunity to be heard in district court, and they are foreclosed by an adverse decision from pursuing their individual derivative claims. Indeed, the plain language of FRCP 23.1, as well as this Court's decisions, confirm that derivative actions implicate concrete, individual claims belonging to shareholders. Any holding confirming the appellate rights of Rule 23 objectors should be extended to Rule 23.1 objectors; at a minimum, the Court should take care not to foreclose the possibility of appeal by this class of persons.

IV. If this Court is not inclined to permit non-party objector appeals, it should at least ensure that limited intervention for purposes of appeal is a practical possibility under Rule 24(a). Confronted with a substantively inadequate settlement challenged only by a non-party objector, but limited by its own recently-invented rule that only-parties-may appeal, the Seventh Circuit last year rewrote much existing Rule 24 intervention law in that

Circuit to allow an objecting class member to intervene for the sole purpose of appealing. That court's approach seeks to permit objector appeals while recognizing the litigation interests of parties.

ARGUMENT

I. INTERVENTION IS NOT REQUIRED FOR A RULE 23 SETTLEMENT OBJECTOR TO APPEAL

A. The Federal Rules and This Court's Precedents Authorize Appeals by Rule 23 Settlement Objectors

1. All class members are entitled – *without* formally intervening under FRCP 24 – to notice and an opportunity to be heard in the district court before any class-wide settlement is entered. Rule 23 expressly prescribes that a class action "*shall not be . . . compromised* without . . . notice of the proposed compromise . . . to all members of the class." FRCP 23(e) (emphasis added). *See also Advisory Committee Notes to 1966 Amendments* ("[s]ubdivision (e) requires approval of the court, *after* notice, for the . . . compromise of any class action") (emphasis added). It is long-settled practice, unchallenged in this or any of the cases involved in the current circuit split, that class members, once notified, are entitled to present objections to the terms of the proposed settlement before the district court. Indeed, because a settlement is a final and binding judicial resolution of class members' individual claims (particularly in Rule 23(b)(1), 23(b)(2), and 23.1 cases where class members may not "opt-out"),

failure to allow them to be heard in district court proceedings would offend due process.[2]

There is no question that Rule 23 class members have Article III standing to appeal. *In re Navigant Consulting, Inc. Sec. Litig.*, No. 01-2311, 2001 U.S. App. LEXIS 27164, at *7 (7th Cir. Dec. 26, 2001) (Easterbrook, J.) ("Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?"). Nor is there any question that appeals by Rule 23 objectors comport with pertinent statutory authority: 28 U.S.C. § 1291 authorizes appeals from any "final decision" without limiting *who* may appeal. And nothing in the Federal Rules of Appellate Procedure precludes objectors from appealing. *See* Point I.B, *infra*. There is, thus, no legal bar to objector appeals.

2. The only question presented by this case is whether, untethered to any constitutional, statutory, or rule-based authority, the Court should require class members to intervene for the limited purpose of obtaining appellate review of a district court decision overruling their objections to a settlement. Some courts of appeals argue in favor of such judicial activism on the ground that "[o]bservance of form has benefits." *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. While perhaps attractive at first blush, this argument rests on the undefended, even unarticulated, premise that absent class members are not already "parties" to Rule 23 proceedings. That premise is false.

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[2] *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (unnamed class member has a due process right "to be heard and participate in [class action] litigation"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (unnamed class member has a due process right to object at the fairness hearing); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (objector entitled to be heard, to examine witnesses and to submit evidence), *cert. denied*, 493 U.S. 1058 (1990); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) (same), *cert. denied*, 424 U.S. 967 (1976).

When Congress uses common law terms in statutes or rules, it is presumed, absent an express contrary indication, to incorporate common law meanings and definitions. *United States v. Carter*, 530 U.S. 255, 264-66 (2000). By the time the Federal Rules of Civil Procedure were adopted, the terms "class" and "class member" had well-established meanings at common law which included the understanding that members of a class action *are* parties in interest to the suit. As early as 1850, this Court held that

> [w]here the *parties interested in the suit* are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a *portion of the parties in interest* to represent the entire body, and the decree binds all of them the same as if all were before the court."

Smith v. Swormstedt, 57 U.S (16 How.) 288, 301 (1850) (emphases added). Indeed, precisely because absent class members were defined by *Swormstedt* to be parties in interest, this Court found no due process impediment in holding that they may be bound by a class action judgment. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). *Cf. Hansberry v. Lee*, 311 U.S. 32, 42-45 (1940) (class members are "absent parties").

Years before *Swormstedt*, Justice Story, who "is credited with having formulated" the class action in this country, 7A Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 1751, at 10 (2d ed. 1986), explained that, at common law, all class members are entitled to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Joseph Story, *Commentaries on Equity Pleadings* 96 (1840 ed.). *See also West v. Randall*, 29 Fed. Cas. 718, 722-23 (C.C.D.R.I. 1820) (No. 17,424) (Story, J.) (class members may appear in court "as quasi parties to the record").

In this respect, the Court in *Swormstedt*, *Ben-Hur*, and *Hansberry*, as well as Justice Story in his writings, followed longstanding English class action practice in which it was understood that "every individual ought . . . to . . . have the power of appealing, whether he has been a suitor . . . or by some other person as his representative." Frederic Calvert, *Observations on Suits in Equity* 38 (2d ed. 1846) (citing *Osborne v. Usher*, 6 Brown's Parliamentary Cases 20 (1721)).

The fact that the Federal Rules of Civil Procedure lack any definition of the term "party," let alone one suggesting that Congress intended to displace common law understandings of the term, only serves to confirm that class members continue to be parties in interest, as they were at common law. *See Carter*, 530 U.S. at 264-66. To the extent that the Rules do cast light on the meaning of the term "party," moreover, they aid petitioner's cause. Rule 23 provides that class actions are brought by named plaintiffs on behalf of themselves individually and as *representatives* for all others similarly situated. And Rule 10 indicates that a complaint "shall include the names of all parties." Typical of class action complaints, respondents' complaint in this case named as parties "Anthony Santoro, Sr. and George Thomas Debar, individually *and as representatives of a class of all persons similarly situated*," whereas it named other defendants only in their individual capacities, not as representatives of an entire party-class. (Emphasis added.)

3. Even if class members were not already parties in interest to the proceedings, the notion that only parties may appeal cannot bear scrutiny. This Court has repeatedly approved appeals by non-parties with a concrete interest in the litigation – persons and entities it has variously labeled "de facto" or "quasi-" parties – so long as certain prerequisites are satisfied. Objecting class members meet each and every prerequisite established by this Court.

In *Blossom v. Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), the Court asked the question, "Is the appellant so far a

party to the original suit that he can appeal?" *Id.* at 655. In that case, Blossom had made a bid for a property at a foreclosure auction. The sale was suspended and Blossom sought to have the sale completed and confirmed. When the district court refused, Blossom appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the suit in the district court. This Court rejected the railroad's argument and upheld Blossom's appeal, explaining that it

> seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders . . . . Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment became *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on their [claims]. *Id.* at 655-56.

The Court has endorsed appeals by de facto or quasi- parties in case after case since *Blossom*.[3] The courts of appeals –

[3]*E.g.*, *Williams v. Morgan*, 111 U.S. 684, 700 (1884) (holding that objectors to trustee charges were "quasi parties" entitled to appeal without formally intervening: objectors "had such an interest, and were so situated in the case, that they had a right, by leave of court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court"); *Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1864) ("nominal parties" could not evade appellate review of an order decreed in their favor on the ground that they were not formal parties in the district court); *Hinckley v. Gilman, Clinton & Springfield R.R.*, 94 U.S. 467, 469 (1877) (receiver allowed to appeal from a decree against him even though he was not a party); *Sage v. Railroad Co.*, 96 U.S. 712, 714 (1877) (quasi parties permitted to appeal); *Trustees v. Greenough*, 105 U.S. 527, 531 (1881) (trustees allowed to appeal order awarding costs and expenses to a complainant suing on behalf of a trust fund); *Hovey v. McDonald*, 109 U.S. (14 Otto) 150, 155-57 (1883) (permitting appeal to be brought against a receiver from an order made in his favor notwithstanding receiver's contention that appellant was not a "party" to the underlying suit); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1882) (actual parties or ones "treated as such" by trial court may appeal); *Bayard v. Lombard*, 50 U.S. (9 How.) 530, 551 (1850) (parties and privies may appeal).

including many of the circuits purporting to require a different rule for objecting class members – likewise regularly entertain appeals from a diverse array of quasi-parties aggrieved by a district court ruling. These include appeals by non-parties held in contempt for refusing discovery seeking to pursue claims of privilege, lack of personal jurisdiction, and other defenses[4]; non-party attorneys and expert witnesses complaining that their fees were denied by the district court[5]; and non-parties obligated to reimburse the defendant for amounts paid under a district court's judgment.[6]

[4]*E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consol. Utils., Inc.*, 126 F.3d 215, 218 (3rd Cir. 1997); *United States v. Bertoli*, 994 F.2d 1002, 1012 (3rd Cir. 1993), *cert. denied*, 510 U.S. 820 (1993); *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 n.2 (5th Cir. 1988); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992); 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 124 (compiling cases).

[5]*E.g.*, *Angoff v. Goldfine*, 270 F.2d 185, 186 (1st Cir. 1959); *Lipscomb v. Wise*, 643 F.2d 319, 320-21 (5th Cir. 1981); *Price v. Pelka*, 690 F.2d 98, 102 (6th Cir. 1982); *Preston v. United States*, 284 F.2d 514, 515 n.1 (9th Cir. 1960); *United States v. Tippett*, 975 F.2d 713, 718 (10th Cir. 1992); *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 424 (10th Cir. 1979); *James v. Home Constr. Co. of Mobile, Inc.*, 689 F.2d 1357, 1359 (11th Cir. 1982); *See* 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 126 & n.45 (compiling cases).

[6]*E.g.*, *Fields v. Blum*, 629 F.2d 825, 827 (2d Cir. 1980) (order enjoining reduction of welfare benefits by city official could be appealed by state, since

Distilled to their essence, the foregoing cases permitting non-party appeals all involve individuals or entities who: (i) had notice of the district court proceedings, (ii) actually appeared and litigated their positions in district court, and (iii) were aggrieved by the district court's decision and barred by the doctrine of claim preclusion from re-litigating their claims elsewhere. As Judge Learned Hand explained: While persons who are not formally parties are usually forbidden from appealing because their claims are "not concluded by the decree, and [they are] not therefore aggrieved by it," where a judgment *does* "affect[] [that person's] interests, *he is often allowed to appeal.*" *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (emphasis added).

Objecting class members indisputably meet all these conditions. They are entitled to notice and an opportunity to be heard, their personal interests are aggrieved, and any claims they might have are extinguished by operation of an adverse judgment. As recently as 1997, this Court reviewed a case that had been appealed to the court of appeals by a Rule 23 objector without pausing for a moment over the objector's purported lack of "party" status. *Amchem*, 521 U.S. 591.

4. It is axiomatic that courts seek to read rules and statutes in ways that harmonize them and avoid incongruous results. Permitting Rule 23 objectors to appeal comports entirely with Article III and does no damage to the relevant statutory framework governing appeals from final judgments in class actions. Meanwhile, a view of Rule 23 requiring objecting class members to intervene would create serious discordance between Rules 23 and 24.

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state was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials); 15A C. Wright, *et al.*, *Federal Practice and Procedure* § 3902.1, at 127 & n.47 (compiling cases).

First, the proper means for objecting class members to intervene would be under Rule 24(a), as an intervention of right, because the objecting class member's interest "relat[es] to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." FRCP 24(a). But under Rule 24(a), an objecting class member cannot intervene if his or her interest is already "adequately represented by existing parties." *Id.* In any class action or derivative suit, the district court makes just such a finding at the outset of the case, holding that the named plaintiff *does* "fairly and adequately protect the interests of the class." FRCP 23(a)(4).

So, for an objecting class member simply to lodge an objection to the terms of a particular settlement, he or she would have to convince the district court to reconsider its prior ruling and throw out the existing class representative. Much settled law disfavors judicial reconsideration of prior rulings, especially in this context. Once a class representative has been approved, "representation will be presumed adequate." 7C C. Wright, *et al.*, *Federal Practice and Procedure* § 1909, at 324; *cf. Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 691-92 (1961). Indeed, some lower courts have suggested that, as a matter of law, objectors' interests are "adequately protected" by already-approved representatives. *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.), *cert denied*, 469 U.S. 858 (1984). *See also National Ctr. for Mfg. v. Department of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000) (motion for reconsideration will be granted only if new facts "compel" a change in the court's ruling). Interpreting Rule 23 as requiring intervention to appeal, thus, creates a practically unworkable regime: an objector must intervene to appeal, but he or she faces a substantial hurdle in showing that the district court's prior determination that existing representatives are "adequate" should no longer govern.

Though Rule 24(b) would not be the appropriate vehicle for intervention given class members' direct personal stake in the outcome of the case, even if that Rule were applicable it would not solve the problem. Rule 24(b) requires motions to intervene to be "timely." Under existing case law (endorsed by the Fourth Circuit), any motion to intervene made after a tentative settlement has been reached presumptively fails that test. *See* Pet. App. A10-11 (citing cases). Yet, under Rules 23 and 23.1, class members often first become aware of the need to assert their interests only *after* a settlement has been struck. *See* Pet. App. A33-34 (Michael, J., dissenting) ("most unnamed class members do not realize that they might have an objection until they receive notice of the fairness hearing at the end of the litigation"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991) (class members receive little information about their case as it goes along).[7]

Second, even if objectors could (somehow) successfully intervene under Rule 24(a) or (b), imposing such a requirement would be inconsistent with Rule 23's structure. Rule 23 provides class members with notice and a right to appear without taking on the encumberances of party status. It would be at odds with the design of the Federal Rules to absolve class members from

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[7]While petitioner in this case had detailed knowledge of the lawsuit prior to settlement, this is unusual. Most individual class members, including many sophisticated institutional investors who are members of the Council, frequently do not have any inkling that their interests are being inadequately represented until *after* a settlement has been reached, as illustrated by the facts of the *Felzen* dispute before this Court three years ago. There, the first written notice of the case was issued to shareholders on May 30, 1997, *after* a settlement had been reached, and it provided objectors with just *four weeks* to prepare for a fairness hearing on a proposed settlement. *See Felzen* Petitioners' Br. 6.

intervening for purposes of raising objections in district court but then require them to intervene *not* for any purpose associated with the district court proceedings (which the Federal Rules of Civil Procedure are designed to govern), but simply to afford "standing" in a *court of appeals*. *See Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) ("[i]t would make little sense to invite a [class member] to file objections in the manner provided by Rule 23[] and then deny him the right to challenge the district court's ruling on his objection" unless he becomes a party).

B. There Are No Constitutional, Statutory, or Case Law Impediments to Rule 23 Objector Appeals

It is telling that the Fourth Circuit's decision in *Devlin* neither confronts nor cites any of the foregoing legal authorities. Instead, the Fourth Circuit rests its judgment entirely upon its *policy* assessment that "the need for effective class management and to avoid class fragmentation weighs strongly in favor" of requiring objectors to intervene. Pet. App. A21.

Other courts of appeals, most notably the Seventh Circuit, have decried reliance on policy arguments, offering up various legal theories in support of their view that objecting class members must intervene to appeal. *Navigant*, 2001 U.S. App. LEXIS 27164, at *8. But none of these legal theories has borne scrutiny over time and it is no surprise that the Fourth Circuit abandons them even as it struggles to substitute new policy rationales to salvage its favored result.

1. Some early circuit decisions made much of *Marino v. Ortiz*, 484 U.S. 301 (1988). But a growing number of courts, including the Fourth Circuit, have recognized that such reliance is misplaced. Pet App. A15-16 n.12. Unlike Rule 23 objectors, the persons seeking to appeal in *Marino* were not members of the class, but outsiders to the proceedings with no right to participate in the district court under Rule 23. More specifically, they were

white police officers seeking to challenge a class action settlement between black officers and police authorities. Nothing in *Marino* addressed the appellate rights of persons who *are* members of the class whose interests are directly adjudicated by a judgment entered in the case and who receive a mandatory notice expressly inviting them to participate in trial court proceedings. *See Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308 n.6 (3rd Cir. 1993); *Kaplan*, 192 F.3d at 67-68.[8]

The lone case cited in the pertinent passage of *Marino* confirms the limited nature of *Marino*'s holding – and its inapplicability here. *United States ex rel. Louisiana v. Jack*, 244 U.S. 397 (1917), involved a land dispute between a state agency and a landowner. The State of Louisiana sought to participate in the proceedings. The Court held that the State was not a proper party and explained that "it has long been the law" that only "part[ies] *and priv[ies] to the record*" may appeal an adverse decision, though even to this rule the Court acknowledged some "exceptions." *Id.* at 402 (emphasis added). Objecting class members are at least quasi-parties permitted to appeal under the rule stated in *Louisiana* and approved in *Marino*. *See* pp.7-10, *supra*. Moreover, reading *Marino* as holding that only parties to a lawsuit, or those that properly become parties, may appeal, would require upsetting an enormous body of settled law on the strength of a single phrase in that *per curiam* opinion. *See* notes 3-6, *supra*. That action would be so extraordinary that even respondents do not urge it here.

2. Beyond *Marino*, some circuit decisions (again, notably not the Fourth Circuit's recent ruling) have sought to justify their result by pointing to FRAP 3(c). *E.g.*, *Felzen v. Andreas*, 134 F.3d 873, 874 (7th Cir. 1998). Rule 3(c) provides that "[a] notice

[8]Even as to the strangers to the case at issue in *Marino*, the Court merely purported to establish "better practice," not to establish an exceptionless rule. *See* 484 U.S. at 304.

of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." (Emphasis added.) Since no "party" is taking the appeal from the district court, the reasoning goes, it must be improper under Rule 3(c). This argument founders on its undefended premise that class members are not "parties." *See* pp. 5-7, *supra*. Such a reading of Rule 3(c) would also have the unlikely effect of barring not just Rule 23 objector appeals, but *all* nonparty appeals.

The Federal Rules of Appellate Procedure, moreover, are *not* intended to limit the jurisdiction of the courts of appeals over appeals from final district court judgments; that is the function of Article III and 28 U.S.C. § 1291, neither of which poses any obstacle here. FRAP 1(b) states in no uncertain terms that "[t]hese rules *do not extend or limit the jurisdiction of the courts of appeals*." (Emphasis added.) And the language of Rule 3(c) itself does not purport to delineate who is eligible to appeal. Rather, as its title suggests, Rule 3(c) is concerned only with the formal "*contents* of the notice of appeal" filed by otherwise eligible appellants. (Emphasis added.) Rule 3(c) simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it.[9]

3. On occasion, this Court has stated that only a "party" may appeal. In making such statements, however, no decision of this Court has purported to overrule *Blossom* or its abundant progeny. Indeed, in all of these cases, the litigant seeking to appeal lacked

[9]The 1967 advisory committee notes indicate that Rule 3(c) "merely restate[s], in modified form, provisions now found in the civil and criminal rules . . . and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules*." FRAP 3(c) 1967 advisory committee note (emphasis added). *See also* 1979 advisory committee note ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with").

at least one of three characteristics that the Court has imposed (in *Blossom* and its progeny) as a precondition for appeal by a non-party litigant. In six of the cases, the purported appellant lacked notice and the opportunity to be heard in the district court.[10] In two of the cases, the would-be appellant did not even participate in district court proceedings.[11] In other cases, the district court's decision did not bind the appellant by force of claim preclusion.[12] Properly understood, this Court's decisions have never denied a right to appeal by a litigant in the same position as a settlement objector.

[10] *Karcher v. May*, 484 U.S. 72, 77 (1987); *Payne v. Niles*, 61 U.S. (20 How.) 219, 221 (1858); *Ex parte Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911) (specifically acknowledging that "privies to the record" may appeal); *Ex parte Cockcroft*, 104 U.S. at 578-79.

[11] *Ex parte Cutting*, 94 U.S. 14 (1876); *Connor v. Peugh's Lessee*, 59 U.S. (18 How.) 394, 395 (1856).

[12] *E.g.*, *Ex parte Cockcroft*, 104 U.S. at 578 (denying appeal by party who "did not make it appear that he had any real interest in the controversy"); *Payne*, 61 U.S. (20 How.) at 220 (person who had never sought relief directly against judgment debtor could not appeal judgment); *Connor*, 59 U.S. (18 How.) at 395 (tenant who did not contest ejectment prior to judgment could not appeal); *Marino*, 484 U.S. 301 (outsiders to a class action, not class members, seeking to appeal). In fact, some state that non-parties bound by the trial court decision *can* appeal. *E.g.*, *Bayard* 50 U.S. (9 How.) at 551 (noting that "*privies to the record*" as well as parties may appeal). *See also Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000) (individuals in a non-class action suit who only might be affected by injunction entered in a software licensing dispute had only "an indirect and incidental" interest in the outcome) (internal quotation marks omitted).

II. THE FOURTH CIRCUIT'S POLICY-BASED RATIONALE FOR REQUIRING INTERVENTION IS LEGALLY INSUFFICIENT AND CANNOT WITHSTAND SCRUTINY ON ITS OWN TERMS

The Fourth Circuit did not pretend to rest its decision on any statutory mandate, rule, or controlling case law. It even disparaged prior attempts by its sister circuits to base an intervention requirement on this Court's decision in *Marino*. Pet. App. A15-16 n.12. The Fourth Circuit instead "balanc[ed]" a series of policy considerations, acting in effect as a mini-legislature. Even assuming the legal sufficiency of such an exercise, the Fourth Circuit's policy rationales are unpersuasive on their own terms.

A. Participation by objectors helps expose and prevent collusive settlements, which are themselves frequent by-products of class action and derivative suit litigation. In Rule 23 and 23.1 disputes, strong economic incentives tempt plaintiffs' counsel and defendants to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atlantic*, 2 F.3d at 1310; Pet App. 30-31.[13] Settlement hearings frequently devolve into "jointly orchestrated" "pep rallies" in which no party questions the fairness of the settlement.[14] As a result, courts have long considered objecting

[13] *See also Bell Atlantic*, 2 F.3d at 1309 n.8, 1310 n.10 (citing, *inter alia*, Richard A. Posner, *Economic Analysis of Law* § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial").

[14] Macey & Miller, *supra*, 58 U. Chi. L. Rev. at 46. *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714-20 (1986).

class members to "play an important role by giving courts access to information on the settlement's merits," especially because "judges no longer have the full benefit of the adversarial process." *Bell Atlantic*, 2 F.3d at 1310. *See also* Pet. App. A31; *Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

Objectors perform this same function on appeal. The right of appeal provides a strong incentive for district courts to consider objectors' concerns and a direct avenue for correcting district court errors. Pet. App. 32; Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 408-26 (1995) ("fear of reversal" "induc[es] trial court judges to make fewer errors"). Of the 44 published objector appeals between 1971 and 2000 that the Council has been able to locate in LEXIS, fully 32% (14) resulted in reversals, a higher percentage than for civil cases generally. *See* Administrative Office of the United States Courts, *2000 Annual Reports*, Table B-5 (courts of appeals' reversal rate in civil cases is approximately 12%). In the Rule 23.1 context, 25% of the appealed settlements identified by the Council (7 of 28) were reversed during the same period.

This Court's decision in *Amchem* illustrates the point. Without the participation of objectors, permitted by the Third Circuit and this Court in that case, a highly flawed settlement that failed to compensate many victims and failed to satisfy Rule 23 as a matter of law would have been thrust upon a class of hundreds of thousands of persons exposed to asbestos. *See* 521 U.S. 591. Objector appeals have yielded similar tangible benefits for class members in other recent cases.[15]

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[15]For example, the court of appeals in *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), held that non-party shareholders could appeal the $2.6 million fee award and the court ultimately held that award to be excessive. "As a direct result," the district court subsequently ordered $1.4 million returned to the corporation. *Id.* at 1448; Order, Civil Case No. 91-B-2164 (D. Colo. Feb. 14, 1997). *See also Kaplan*, 192 F.3d 62 (reversing award of $1 million in fees because the action provided no substantial benefit to the corporation or its shareholders); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171 (3rd Cir. 2001) (reversing award of $582,443.44 in fees because the action provided no substantial benefit to the corporation).

B. Even if objectors could (somehow) surmount the legal hurdles posed by an intervention requirement, *see* pp. 10-13, *supra*, requiring intervention would extinguish the modest incentives that now exist for objectors to fulfill their important public function.

Objectors receive no direct financial compensation for their activities, and no guarantee of lucrative attorney fee awards even if they succeed in convincing a court not to approve a settlement. They participate in class action proceedings only for whatever incremental *pro rata* value might accrue to them as a result of their efforts. *Bell Atlantic*, 2 F.3d at 1309. Meanwhile, objectors shoulder the substantial costs of hiring counsel, analyzing settlement materials, filing written objections, and appearing in court, all within a matter of days or weeks. Even the largest institutional investors only rarely have the incentive – and the means – to participate. *See* Remarks of District Judge Vaughn R. Walker, ABA National Securities Litigation Institute at 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare. . . . This is no surprise. . . . [I]nstitutional investors have disincentives to becoming [parties]. . . . Lawsuits are costly in time, money and other resources.").

Requiring intervention would force objectors wishing to preserve a right of appeal to incur the added financial burden of drafting a pleading the equivalent of a complaint (mandated by Rule 24), litigating the timeliness of their motion and the adequacy of existing representation, as well as assuming the responsibility of appearing for depositions and responding to

written discovery.[16] In addition, because notice of a pending class action suit often first arrives with news of a proposed settlement, *see* p. 12 & note 7, *supra*, class members would be forced to make a snap decision whether to seek and accept the responsibilities associated with party status. Even though they are the most likely to have enough at stake to make participation economical and Congress has sought to encourage their participation in class action litigation, institutional class members simply cannot make such decisions that quickly, because of the need to consult their boards of directors.[17] This Court should not adopt a rule at odds with the policy direction Congress has given in this area. *See* pp. 1-2, *supra*.

C. The Fourth Circuit suggests that requiring intervention serves the purpose of enhancing judicial efficiency. But the substantial costs associated with objecting and appealing *already* deter meaningful shareholder participation in all but the most obvious cases of abuse.

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[16] *Cf.* Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 Ariz. L. Rev. 559, 562 (1996) ("[f]ormal participation and its attendant litigation cost and risk may . . . be an unnecessarily complex and expensive means for institutional investors to express their views on the merits of class action or derivative litigation"); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Shareholders Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2103-05 (1995) (discussing barriers imposed by intervention).

[17] *See* 15 U.S.C. § 78u-4(a)(3)(A)(i) (seeking to increase the likelihood of institutional shareholder participation in class actions by increasing notice period after filing of securities class action complaints to afford potential lead plaintiffs time to come forward); Weiss & Beckerman, 104 Yale L.J. at 2100 ("[l]ack of timely notice makes it difficult for institutional investors to participate in class actions"); pp. 1-2, *supra* (quoting PSLRA House Conference Report).

The Council has been able to locate in LEXIS just 44 Rule 23 objector appeals during the 29-year period 1971-2000, and just 28 such appeals in the Rule 23.1 context. Despite decades of practice permitting objector appeals in the Second, Third, and Ninth Circuits – circuits where a large proportion of all class actions are initiated – the Council is unable to locate a single court or commentator complaining about the manageability of objector appeals. Indeed, the Fourth Circuit below was not presented "with *any evidence* that objector appeals have gummed up the works in the circuits . . . where they are expressly allowed." Pet. App. 32 (emphasis added).[18]

In fact, mandating intervention would impose *more* work on the federal courts, not less. The district court would have to litigate and resolve a motion to intervene as well as a settlement hearing. Pet. App. A34 (Judge Michael noting "the intervention alternative . . . does nothing to take care of [the] concern about "delay[ing] class settlements on appeal"). *See also Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 463 (D. Del. 1984) (complaining that Rule 24 motion to intervene was "superfluous procedural question" since nonparty objector was already an invited participant in litigation).

D. The Seventh Circuit recently criticized the Fourth Circuit's decision below as an example of "policymaking by judges." *Navigant*, 2001 U.S. App. LEXIS 27164, at *6. Yet, besides discredited arguments from *Marino* and Rule 3(c), the Seventh Circuit itself offered only a policy argument for intervention, opining that requiring litigants to take the formal

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[18] The government, which bears responsibility in assisting in the administration and development of the Federal Rules and the enforcement of the securities laws that give rise to many class actions, just three years ago in *Felzen* endorsed objector appeals and represented that it is not concerned "that [the] limited degree of participation by persons other than the named plaintiff will unduly disrupt the litigation or render it unmanageable." *Felzen* Gov't Br., No. 97-1732, at 28.

step of becoming parties "has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds." *Id.* at *8.

The invocation of "uncertainty," without more, is analytically unhelpful. The Seventh Circuit opined that intervention prior to settlement in *Navigant* might have led to additional discovery that, in turn, might have assisted the district court in deciding whether to accept the proposed settlement; by "remaining on the sidelines until after" the settlement, the objectors "hobbled" inquiry into their views. *Id.* at *9. But this argument rests on the erroneous assumption that objectors are typically aware of a pending class action and dissatisfied with existing class representation before a tentative settlement is reached. That is the rare and exceptional case (*see* p.12 & note 7, *supra*), not the norm, and thus (even assuming its legitimacy) can hardly be used as a reliable basis for judicial policymaking.

Nor is there any basis for believing that discovery will aid in resolving all, most, or even any significant number of, settlement objections. It would not have done so in *Amchem* or in similar cases where the objector contends that the settlement agreement is illegal, a question for which no factual inquiry is necessary.[19] Discovery is likewise unnecessary to resolve objector claims that the district court failed to fulfill its own procedural requirements, a frequent basis for appellate reversal.[20] Often, too, objectors attack the size of an attorney fee award in proportion to the results achieved for the class, a question that courts are well-equipped to handle and frequently do so comfortably without burdensome depositions, interrogatories, and the like. *See* p.18 & note 15, *supra* (citing *Rosenbaum, Kaplan, Zucker*). There is also at least some irony in the fact that the Fourth Circuit would mandate

[19] *E.g.*, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir. 1995), *cert. denied*, 516 U.S. 824 (1996).

[20] E.g., *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 997 (9th Cir. 1985); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

intervention out of concern for efficiency and reducing the federal court workload, but the Seventh Circuit would mandate intervention to enable "extra discovery," *Navigant*, 2001 U.S. App. LEXIS 27164, at *8, always a time-consuming and contentious task.

III. RULE 23.1 SETTLEMENT OBJECTORS SHOULD ALSO BE PERMITTED TO APPEAL

Rule 23.1 objectors have at least as strong a case for a right to appeal as Rule 23 objectors, and any ruling permitting Rule 23 objector appeals should be extended to the Rule 23.1 context.[21] As with Rule 23 class members, there is no Article III, § 1291, or rule-based bar to Rule 23.1 objector appeals. Nor should the Court manufacture one.

First, Rule 23.1 shareholders are as much parties in interest as class members. Like their Rule 23 counterparts, objecting derivative suit shareholders are *personally* aggrieved by a district court decision approving an adverse settlement. The Federal Rules recognize this point not only by affording objectors with an opportunity to be heard before any settlement is approved, but also by requiring that the lead plaintiff must "fairly and adequately represent the *interests of the shareholders,*" *not* the corporation. FRCP 23.1 (emphasis added).

In the course of developing the derivative suit paradigm, this Court in *Hawes v. City of Oakland*, 104 U.S. (14 Otto) 450 (1881), explained that such a suit is really "two causes of action": it is a claim on behalf of the company against those who allegedly wronged its interests, but it is *also* a claim by shareholders directly against their "own company" for refusing to take

[21] At a minimum, the Court should avoid reaching out beyond the Question Presented, limited to "class action settlements," to extinguish long-held appellate rights of shareholders without the full benefit of the adversarial process.

corrective action in response to the shareholders' demands. *Id.* at 452. Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a lead shareholder plaintiff owes "fiduciary" duties *not* to the corporation, but to "a class comprising all who are similarly situated" – *i.e.*, other shareholders; "[t]he interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." *Id.* at 549.

Any number of lower courts and respected commentators have similarly recognized the personal shareholder interests at stake in derivative litigation,[22] and so have the Department of Justice and the Securities and Exchange Commission, the federal agencies charged with enforcing the nation's securities laws: "[o]wnership of the corporation's stock . . . gives both the objecting shareholder and the plaintiff shareholder a shared interest in the outcome of the case." *Felzen* Gov't Br. 13.[23]

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[22]*See, e.g., In re Pittsburgh & Lake Erie R.R. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1069-70 (3rd Cir. 1976) (shareholders may appeal derivative suit since their "equity is being diluted"; their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *United States v. LTV Corp.*, 746 F.2d 51, 53-54 n.5 (D.C. Cir. 1984) (objectors may appeal settlement approvals in derivative context because "judgments in such cases bind shareholders"); 5 *Moore's Federal Practice* § 23.1.02[3][b] (D. Coquillette, et al. eds., 3d ed. 1997) ("As an owner of securities in the corporation, the suing shareholder, along with all other shareholders, is harmed by an injury to the corporation.").

[23]Real world experience teaches, too, that shareholders have concrete and direct interests in the outcome of these cases. In the *Felzen* case before this Court three years ago, objectors took issue with a settlement that returned $8 million in value to the corporation and its shareholders instead of the $250 million claimed. The difference amounted to 37 cents per share, or better than 2% per share at current share prices. Petitioner CalPERS alone owned over 2.9 million shares of ADM stock at the time, meaning that its *pro rata* loss can be pegged at over $1 million. Other large institutional investors like CalPERS who control the retirement savings of millions of Americans shared *pro rata* losses in the value of their stock holdings almost as large. The Council and its members are increasingly active in Rule 23 and Rule 23.1 cases precisely because of their large and direct stakes in the outcome of these disputes.

Second, even supposing that shareholders are not parties, they satisfy all the prerequisites required for non-party appeals. *See* pp. 7-10, *supra*. They are provided with written notice of any settlement, and an opportunity to be heard.[24] As *Hawes, Cohen*, and Rule 23.1 confirm, an adverse decision affects their personal interests and an adverse judgment subjects shareholders not just to *stare decisis*, but also to claim preclusion. This Court has already expressly held that shareholders who receive notice and present argument in the district court are "entitled," without intervention, to appeal a receivership ruling that aggrieves them. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 495 & n.4 (1933).[25]

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[24]Until 1966, when Rule 23.1 was broken out into a separate rule, derivative actions were considered a form of class actions governed by what was then Rule 23(b). 7A C. Wright, et al., *Federal Practice and Procedure* § 1752, at 18. As the identity of the language used by Rules 23(e) and 23.1 suggests, that division was in no way intended to grant lesser rights to objecting shareholders than objecting class members. On the contrary, the Advisory Committee specifically noted that the "mandatory notice" requirement contained in old Rule 23 "was *primarily directed* to derivative actions by shareholders." Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure 114 (1964) (citing *Cunningham v. English*, 269 F.2d 539 (D.C. Cir. 1959)) (emphasis added). As in the Rule 23 context, there is an uninterrupted body of law requiring district courts to provide objecting shareholders with an opportunity to be heard at the fairness hearing.

[25]*Johnson* cited for support the Second Circuit's decision in *Christian v. R. Hoe & Co.*, 63 F.2d 218 (2d Cir. 1933), which held that a nonparty shareholder who objected to a receivership "is rightfully here, like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal." *Id.* at 218.

Until the very recent emergence of a circuit conflict on this issue, the appellate rights of Rule 23.1 objectors were once so well-established that then-Judge Stevens categorically stated in 1975 that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action."[26] This view of the law remains correct today, as recognized by the Second Circuit, which recently reaffirmed its longstanding precedent permitting Rule 23.1 objector appeals, and did so without a single dissenting vote in the entire circuit. *Kaplan*, 192 F.3d 60 (rehearing *en banc* denied). Indeed, the case for allowing shareholders to appeal is *stronger* than that for many class members because Rule 23.1 provides no mechanism for objecting shareholders to opt out of an unfavorable settlement. *Rosenbaum*, 64 F.3d at 1442 (considerations permitting appeal apply "more clearly" in Rule 23.1 context).[27]

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[26] *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *overruled by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided Court*, 525 U.S. 315 (1999).

[27] All of the remaining arguments that support objector appeals in the Rule 23 context apply equally well here. A rule requiring intervention would render the Federal Rules incoherent because participation is practically impossible under Rule 24's strictures. *See* pp. 10-13, *supra*. Meanwhile, Rule 23.1 objectors help expose collusive settlements; they have produced an impressive rate of appellate reversals, adding real value to shareholders; there have been no manageability problems suggested by the many courts of appeals that allow objecting shareholders to appeal; and requiring intervention would add, not reduce, the workload of the federal courts, by imposing burdensome litigation requirements that do not contribute to resolving the merits of the objectors' concerns about the proposed settlement. *See* pp. 17-23, *supra*.

IV. AT A MINIMUM, THE COURT SHOULD MAKE INTERVENTION A PRACTICAL POSSIBILITY FOR OBJECTORS

Faced with a substantively inadequate settlement approved by the district court that it wished to reverse, but saddled with the flawed only-parties-may-appeal rule it forged in *Felzen*, the Seventh Circuit recently sought to rewrite much intervention law in order to make it possible for an objecting class member to appeal. *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880-81 (7th Cir. 2000) (Easterbrook, J.). The district court in *Crawford* had rejected the objector's attempts to intervene as untimely, noting that the objector's counsel (like petitioner here) had early knowledge of the case but failed to file a motion to intervene. The district court also refused to grant intervention on the ground that to do so it would have to find the objector's interests inadequately represented and, thus, would have to displace the existing class representative, sending the entire case into disarray. The court of appeals rejected both of these arguments, and held that the district court had abused its discretion in denying intervention because objectors should have the right to intervene at least for the limited purpose of appealing. *Id. See also In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001) (Easterbrook, J.).

In holding that the district had abused its discretion by failing to allow intervention after the settlement agreement was struck, the Seventh Circuit rejected the untimeliness arguments that the Fourth Circuit in this case and other courts have found persuasive grounds for denying intervention. *See* Pet. App. A10-11 (citing cases). The *Crawford* court even (implicitly) contradicted existing Seventh Circuit authority in *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991), which held that "[o]nce the parties have invested time and effort into settling a case it would be prejudicial to allow intervention." *Id.* at 504.

But what the Seventh Circuit appeared to give settlement objectors in *Crawford*, it seemed to take away late last year in *Navigant*. In *Navigant*, the court rejected the notion that a settlement objector has an absolute right to intervene for purposes of appealing, holding that the objector "probably should have intervened *before the settlement was negotiated*," thus apparently reverting to the Seventh Circuit's original rule in *Ragsdale*. 2001 U.S. App. LEXIS 27164, at *3 (emphasis added).

Though the continuing vitality and scope of the Seventh Circuit's decision in *Crawford* permitting intervention for purposes of appealing an adverse settlement is unclear, it remains possible that the court of appeals is inclined to overrule much existing intervention case law in an effort to make it practically possible for at least some objectors to appeal. If this Court is inclined to hold that only parties may appeal, the Council respectfully suggests that it at least attempt to make intervention a practical possibility in the following manner.

Because intervention would properly be a matter of right, *see* p. 11, *supra*, the correct legal vehicle for any new intervention requirement must be Rule 24(a). Currently, the lower courts are loathe to allow intervention under Rule 24(a) because they are required to find the intervenor's interests inadequately represented, which in turn has the cascading effect of forcing them to reconsider their finding, under Rule 23, that the existing class representative adequately represents the interests of all class members. *See* p. 11, *supra*. The Seventh Circuit's position in *Crawford* suggests a view of Rule 24(a) and Rule 23 under which the district court might hold that the objector's views on the terms of a particular settlement are inadequately represented (so that he or she may intervene), but continue to hold that the existing named class representative fairly and adequately represents the class as a whole (so that the existing class representative need not be displaced).

Limiting an objector's right to intervene solely for the purpose of allowing an appeal would also decrease the chance of disruption to existing proceedings and prevent objectors from having to assume the onerous duties associated with party status simply to appeal. Intervention for limited purposes is consistent with the Notes to the 1966 Amendment of Rule 24(a), which indicate that "an intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."

Even if the foregoing presents a workable solution, however, the question remains, what would be gained by such a watered-down intervention requirement? The answer is: nothing. It would require the Court to slice the language of Rules 23 and 24 very thinly indeed – suggesting that the class representative is "inadequate" for some purposes but not others. It would also burden the federal courts with needless motions practice, all so that objectors can obtain a stamp on their passport allowing them to proceed to an appellate court just as they did for decades before the advent of a "party-only" requirement.

The Court should reject the Fourth Circuit's imposition of a new intervention requirement on settlement objectors. There is no constitutional or statutory basis for such a rule. It runs directly contrary to centuries of common law precedent and is inconsistent with the Federal Rules and this Court's cases. It hinders the valuable public functions objector appeals serve while offering no corresponding policy benefits. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 24, 2002

APPENDIX

Federal Rule of Civil Procedure 23:
Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Federal Rule of Civil Procedure 23:
Class Actions, cont'd

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B)

Federal Rule of Civil Procedure 23:
Class Actions, cont'd

the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of

Federal Rule of Civil Procedure 23: Class Actions, cont'd

the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 , and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Federal Rule of Civil Procedure 23.1: Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege

(1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and

(2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Federal Rule of Civil Procedure 24: Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to

Federal Rule of Civil Procedure 24: Intervention, cont'd

intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Supreme Court, U.S.
FILED
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(5)

No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,
Petitioner

v.

ROBERT A. SCARDELLETTI, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF CHARLES C. YEOMANS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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16 pp

Table of Contents

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT: Objecting Class Members Who Would Otherwise Be Bound By A Judgment Approving The Settlement Have Standing To Appeal 3

CONCLUSION 11

Table of Authorities

Cases

Adams v. Morton, 581 F.2d 1314 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe v. United States*, 440 U.S. 958 (1979) 4

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 10

Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980) 3

Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir.), *cert. denied sub nom. Hoffer v. City of Seattle*, 506 U.S. 953 (1992) 4, 5

Dosier v. Miami Valley Broad. Corp., 656 F.2d 1295 (9th Cir. 1981) 6

Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542 (9th Cir. 1990) 3

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 4, 5

Hansberry v. Lee, 311 U.S. 32 (1940) 6

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) 3

In re First Capital Holdings Corp. Fin'l Prods. Secs. Litig., 33 F.3d 29 (9th Cir. 1994) 5

In re Mego Fin'l Corp. Secs. Litig., 213 F.3d 454 (9th Cir. 2000) 5

In re Navigant Consulting, Inc., No. 01-2311, 2001 U.S. App. LEXIS 27164 (7th Cir. Dec. 26, 2001) 6

Keith v. Volpe, 118 F.3d 1386 (9th Cir. 1997) 3, 4

Lobatz v. U.S. West Cellular, 222 F.3d 1142 (9th Cir. 2000) 5

Marino v. Ortiz, 484 U.S. 301 (1988) 4

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) 5

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 5, 9

Powers v. Eichen, 229 F.3d 1249 (9th Cir. 2000) 7, 8

R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir.), *cert.denied*, 528 U.S. 825 (1999) 7

Scardelletti v. DeBarr, 265 F.3d 195 (4th Cir. 2001) 2, 7, 8, 10

Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992) 7

Slaven v. American Trading Transp. Co., 146 F.3d 1066 (9th Cir. 1998) 6

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (*per curiam*) 6

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 9

Other Authorities

U.S. CONST. art. III, § 2 ..... 3, 6

Fed. R. Civ. P. 23(a)(1)-(3) 10

FED. R. CIV. P. 23(a)(4) 10

FED. R. CIV. P. 23(b) 10

FED. R. CIV. P. 23(c)(2)(C) 5

FED. R. CIV. P. 23(d)(2) 5, 9

FED. R. CIV. P. 23(e) 10
FED. R. CIV. P. 24 8
FED. R. CIV. P. 24(a)(2) 9
FED. R. CIV. P. 24(c) 8

Charles C. Yeomans respectfully submits this brief as *amicus curiae* supporting the Petitioner, Robert J. Devlin.[1] The parties have granted consent to the filing of this brief.[2]

INTEREST OF *AMICUS CURIAE*

As a consumer, Yeomans has been a member of a number of settlement classes. In 2000, and for the first time, Yeomans participated in proceedings to consider a proposed settlement, of claims over a credit card issuer's practices. He appeared in federal court as an objector, testifying by affidavit to his inability to make a reasoned opt-out decision on the basis of the notice he received and opposing certification of the proposed class and aspects of the settlement plan disclosed in the notice. Yeomans did not move to intervene in the underlying litigation.[3] His objections, along with all other objections made, were overruled in the final judgment certifying a class for settlement purposes, approving the settlement agreement, releasing rights and claims that existed in favor of class members, and permanently enjoining class members from complaining about certain practices by the card issuer

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of the brief.

[2] Petitioner's consent is on file with the Clerk of the Court. The written consent of Respondent accompanies this brief.

[3] Other class members did move to intervene. The district court denied all such motions, noting that there was no function beyond that of an objector to be served by intervention. *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-75, slip op. at 9 (C.D. Cal. Sept. 29, 2000).

in the future.[4] The judgment thus simultaneously created a binding effect on Yeomans (through certification of the class) and prejudiced his existing and potential claims about the issuer's conduct.

Yeomans appealed to the Ninth Circuit for review of the final judgment; his appeal has been fully briefed and awaits scheduling of the oral argument. In their response briefs, the appellees contend that Yeomans cannot appeal the merits of the final judgment approving the settlement because he did not intervene in the proceedings below. Thus, although there are differences in context,[5] Yeomans's opponents ask the Ninth Circuit to decide as did the Fourth Circuit panel majority in refusing to accord appellate standing to Petitioner Devlin. *Scardelletti v. DeBarr*, 265 F.3d 195, 204-210 (4th Cir. 2001).

SUMMARY OF ARGUMENT

To date, the consistent practice of the Ninth Circuit has been to review the merits of class settlement decisions on appeal by a class member who made timely objections to that settlement. This practice is consistent with generally-applicable principles of appellate standing and affords due protection to class members who are named participants in the consideration of the proposed settlement. This Court should

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[4] Final Judgment and Order Granting Final Approval of Settlement, *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-75 (C.D. Cal. Oct. 17, 2000), *appeal docketed*, No. 00-56958 (9th Cir. Nov. 27, 2000).

[5] For example, Petitioner Devlin is a member of a defendant class preliminarily certified under Rule 23(b)(1) prior to settlement, *see Scardelletti*, 265 F.3d at 200-01; Yeomans is a member of a settlement-only plaintiff class certified under Rule 23(b)(3).

make the salutary practice of the Ninth Circuit the standard for all the Circuits.

ARGUMENT

Objecting Class Members Who Would Otherwise Be Bound By A Judgment Approving The Settlement Have Standing To Appeal.

To be accorded standing, appellants in the Ninth Circuit must show at least "a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995). An appellant must be aggrieved by the decision for which he seeks review, in order to satisfy Article III of the Constitution. *Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir. 1997). Nonparties typically do not have standing to initiate appeals because they are bystanders to the proceedings and not bound by the decisions. Most allowed appeals by nonparties thus are from situations in which the order or judgment purports to be conclusive against the appellants.[6] In limited circumstances, the Ninth Circuit will entertain an appeal from an affected (but not bound) nonparty who "participated in the district court proceedings" if the equities weigh in favor of hearing the appeal. *See Keith*, 118 F.3d at 1390 (preliminary injunction enforcing an ear-

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[6] *See, e.g., Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1546-47 (9th Cir. 1990) (nonparty had standing to appeal declaratory judgment entered against him); *Brown v. Board of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) (dismissed defendants were entitled to appeal specific relief granted against them).

lier settlement restrained parties from issuing permits to nonparty appellant).[7]

The Ninth Circuit applies these standing rules to class actions, whether complex or relatively simple, litigated or settlement-only. In *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir.), *cert. denied sub. nom. Hoffer v. City of Seattle*, 506 U.S. 953 (1992), the court considered a class settlement of a tangle of securities litigation on appeals by members of the certified groups of bond purchasers and groups of bondholders who were not class members. The bondholders' appeals were entertained on the principle that one "who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment without having intervened in the district court." *Id.* at 1277. In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), the court reviewed a number of challenges to a nationwide settlement class, including the appeal by a putative class member who had opted out and claimed that he had effectively opted out all other putative class members from Georgia. *See id.* at 1024-25. Usually, class members' appeals are reviewed on the merits

[7] The Ninth Circuit distinguished *Marino v. Ortiz*, 484 U.S. 301 (1988), by noting that the appellant "was haled into this action by the district court over his objections" on an order to show cause why the injunction should not issue. *Keith*, 118 F.3d at 1391 n.7. The injunction effectively countermanded injunctive relief the appellant had obtained in a state court action. *Id.* at 1389-90. In an earlier decision, *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe v. United States*, 440 U.S. 958 (1979), the Ninth Circuit treated a voluntary participant as if it were an intervenor, even though it never presented a formal motion to intervene.

with no more discussion of standing than the appellants' description as class members or objectors.[8]

Even without actual participation, an unnamed class member may be bound to the judgment with notice and an opportunity "to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).[9] If an unnamed class member remains absent from the consideration of a settlement, his silence is equally consistent with actual agreement to the proposed settlement or with his having no notice of, or effective opportunity to participate in, the proceedings. In the former case, the absent class member is not aggrieved by the approval of the settlement and so lacks Article

[8] *E.g.*, *In re Mego Fin'l Corp. Secs. Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (appellant "chose not to opt-out but filed objections"); *Hanlon*, 150 F.3d at 1019 (referring to appellants merely as "objectors"); *Class Plaintiffs*, 955 F.2d at 1286 (appeal by settlement class member and representative of a state-court certified class); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (appellants were defined to be, and received notice as, members of the plaintiff class); *but compare In re First Capital Holdings Corp. Fin'l Prods. Secs. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994) (dismissing appeal by class member who suffered no injury redressable by reversal of the challenged attorney-fee award), *with Lobatz v. U.S. West Cellular*, 222 F.3d 1142, 1146 (9th Cir. 2000) (determining that objecting class member had standing to appeal attorney-fee award).

[9] The Rules contemplate opportunities for members "to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." FED. R. CIV P. 23(d)(2) (emphasis added). Rule 23(b)(3) class members must be permitted to "enter an appearance through counsel." FED. R. CIV. P. 23(c)(2)(C) .

III standing.[10] In the latter case, the class member may collaterally challenge the binding effect of the decision as to him. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that decree in previous representative action could not preclude landowners not named as parties nor in privity with any who were).

Objection to a proposed settlement identifies the class member as aware of, and opposed to, what is proposed and simultaneously confirms him as one aggrieved by the order or judgment under consideration. Actual participation in the proceedings to consider the settlement effectively terminates any option to challenge the judgment approving the settlement other than on direct appeal. *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (barring relitigation of claims resolved by class settlement).[11] Although not strictly necessary for standing,[12] objection names the class member, removes any implication of consent, and makes him an actual participant. Thus, the Ninth Circuit has described objection as sufficient for class members to appeal from settlement decisions.

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[10] *Cf. Slaven v. American Trading Transp. Co.*, 146 F.3d 1066, 1069-70 (9th Cir. 1998) (holding that appellant defendant waived earlier objections to plaintiff class settlement with another party, ending its right to appeal from the settlement's approval).

[11] *Cf. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*, dismissing writ of certiorari as improvidently granted) (holding that members' collateral challenge to settlement class certification was precluded by *res judicata* after unsuccessful objections and direct appeal by other class members).

[12] As put succinctly by Judge Easterbrook: "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc.*, No. 01-2311, 2001 U.S. App. LEXIS 27164, *7 (7th Cir. Dec. 26, 2001).

Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000) (a class member may appeal the attorney-fee award if he "files an objection in district court to the amount of attorneys' fees requested in a class action settlement under Rule 23 ...."); *Silber v. Mabon*, 957 F.2d 697, 700 (9th Cir. 1992) (a class member may challenge the adequacy of the settlement notice procedures after he missed the opt-out deadline, if he appeared in the district court and objected to the notice).

The Fourth Circuit applies similar standards of affected interests and actual participation to allow nonparty appeals. *See Scardelletti*, 265 F.3d at 206 n.13 (citing exceptions made in "the non-class action context").[13] In reviewing Petitioner Devlin's appeal from a post-judgment order enjoining all class members from pursuing in other forums any issues encompassed by the settlement, *id.* at 210-13, it tacitly followed its established practice of permitting appeal by addressees of an injunction regardless of their "party" status.[14] The majority in *Scardelletti* nonetheless chooses to jettison the usual principles of standing to treat an objecting class member as less than a nonparty:

> [M]erely requiring unnamed class members to object to the settlement as prerequisite to their right to appeal does not adequately protect concerns about effi-

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[13] The majority in *Scardelletti* describes an exception for nonparties who have an interest in the cause litigated and have participated sufficiently "'to make [them] privy to the record.'" *Id.* at 206 n.13 (quoting *Davis v. Scott*, 176 F.3d 805, 807 (4th Cir. 1999)).

[14] *See, e.g., R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir.) (holding that those to whom preliminary injunction was directed had standing to challenge the injunction on appeal), *cert. denied*, 528 U.S. 825 (1999).

> ciency and effective class management because if the district court does not agree with the objections of the unnamed class members, it will proceed to approve the class settlement. Allowing appeals from each unnamed class member after approval of the class settlement implicates the precise management and efficiency concerns with which the class action system is concerned.

Id. at 209. It is a procrustean solution to make class settlement manageable by cutting off protections for class members. If according class members appellate rights equivalent to those of participants in non-class litigation makes a class settlement unmanageable, then the class should not be certified and the settlement should not be approved.

The choice of intervention rather than objection as the prerequisite for an appeal, *id.* at 208-210,[15] is unsupported by the Rules and leads to further error. First, intervention is over- and under-inclusive in identifying appropriate appellants to challenge a class settlement. In the Rules, intervention is designed as a voluntary means for an interested person to enter the action on her own motion and supplement the subject matter of the litigation. *See* FED. R. CIV. P. 24.[16] The

[15] The Ninth Circuit has never held that a class member must (or should) intervene in order to appeal from the approval of a settlement. *Powers*, 229 F.3d at 1256, expressly holds that intervention is not necessary for a settlement class member to appeal the attorney-fee award.

[16] A motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c).

function for intervention mentioned in Rule 23 is similarly to "present claims or defenses," FED. R. CIV. P. 23(d)(2) , whether applicable only to the intervenor or to all or some of the other class members. Intervention does not signify that the movant considers the class representation to be other than fair and adequate,[17] and may be unrelated to any proposed class settlement. In contrast, objection focuses on the settlement under consideration, reacting to matters raised by others. Objectors also are free to articulate challenges that might be waived by (or inconsistent with) a request for intervention, such as defects in jurisdiction.[18]

Second, restricting appeal to those class members entitled or actually permitted to intervene risks insulating class settlement approvals from review. If the court assesses the settlement to be fair, it is unlikely to determine that the class has been inadequately represented with respect to that settlement or that there is

[17] Only intervention pursuant to Rule 24(a)(2) requires that the movant's interest not be adequately represented by existing parties. *See also* FED. R. CIV. P. 23(d)(2) (listing in the disjunctive opportunities for class members "to intervene and present claims or defenses" and "to signify whether they consider the representation fair and adequate").

[18] This Court has held that the exercise of personal jurisdiction over absent plaintiff class members can be challenged on due process grounds. *Phillips Petroleum*, 472 U.S. at 811-12. A class member moving for intervention is affirmatively asking the court to exercise jurisdiction. On the other hand, a participant who limits himself to objections should not be deemed to have waived objections to jurisdiction. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 109-10 (1969) (appellant company — which was not named as a party, was never served, and did not formally appear at trial — challenged damage award and injunction entered after it had appeared specially and objected that the trial court was without jurisdiction over it).

any utility in permitting intervention. A rule limiting appeals to only those class members denied intervention "whose interests were not adequately protected by the class representatives," *Scardelletti*, 265 F.3d at 209, forecloses review of the fairness inquiry under Rule 23(e) and of the structural safeguards in Rules 23(a)(1)-(3) and 23(b), merely because the adequacy requirement of Rule 23(a)(4) has been met. Making merits review of class settlement determinations dependent on showing inadequacy is an error of similar magnitude to making settlement class certification "dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

Third, requiring intervention (or a showing that intervention was wrongfully denied) in order to appeal the merits of the settlement approval allows appellate review to be blocked because the motion to intervene is deemed "untimely." The Fourth Circuit determined that Petitioner Devlin's intervention after the settlement was proposed for preliminary approval "would have likely resulted in further delay and substantial litigation." *Scardelletti*, 265 F.3d at 203. Even if intervention at that point was untimely,[19] there is no finding that his objections to the proposed settlement were untimely or required any delay or expansion of the district court's consideration of the class settlement.

---

[19] The *Scardelletti* opinion notes that Petitioner Devlin had earlier opportunities to participate in the conduct of the litigation or to supplement the efforts of the class representatives. 265 F.3d at 200 (original complaint named him as a representative of a defendant subclass); *id.* at 201 (through counsel, he informally requested intervention).

Petitioner Devlin is evidently a class member, and made objections to the proposed settlement that were heard by the district court. *Id.* at 201. After the district court rejected those objections, he sought direct review of that adverse decision. As an objecting class member, he should be entitled to appellate review on the merits of his challenges to the class settlement.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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No. 01-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST, AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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38 pp

QUESTION PRESENTED

Can class members who are not named parties to a class action appeal the district court's rejection of their objections to a settlement, properly presented in response to notice required by Rule 23 of the Federal Rules of Civil Procedure, without going through an intervention proceeding to redesignate them as named parties?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities v

Brief of Charles L. Grimes *et al.* as Amici Curiae in Support of Petitioner 1

I. Interest of the Amici Curiae 1

II. Summary of Argument 4

III. Argument 5

A. "Party" Is Not a Term With a Fixed Invariable Meaning, and Mechanical Interpretation of FRAP 3 and *Marino* v. *Ortiz*, 484 U.S. 301 (1988), as Permitting Only Appeals by Formal, Named Parties Is Incorrect 5

B. History, Established Usage, and Policy Considerations All Support Inclusion of Unnamed Class Members as "Parties" For Purposes of Appeal 9

1. Unnamed Class Members Have Been Considered "Parties" Since the Inception of the Modern Class Action Nearly 300 Years Ago 9

2. Policy Considerations Strongly Favor Liberal Appeals of Rejections of Objections to Class Action Settlements, Without the Encumbrance of Formal Intervention 16

(a) Obstacles Should Not Be Put in the Way of Searching Examination of Class Action Settlements, in Light of the Widely Recognized Potential for Collusion and the Public Policy Clearly Expressed by Congress 16

(b) Appellate Courts Should Not Abdicate Their Responsibility To Do Substantive Justice in Favor of Gatekeeping Determinations by Lower Courts Unrelated to the Merits of a Settlement 22

C. If Nevertheless the Court Should Conclude That Intervention Is Necessary, No More Should Be Required Than a Pro Forma Post-Judgment Intervention As of Unconditional Right With Minimum Paperwork 24

IV. Conclusion 26

Appendix

Opinion of the Court of Appeals for the Seventh Circuit in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, ___ F. 3d ___, No. 01-2311, 2001 WL 1646846 (7th Cir. December 26, 2001) 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Alleghany Corp. v. *Kirby*, 333 F.2d 327 (2d Cir. 1964), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) 19, 20, 21

Allessandro v. *State Farm Mut. Auto. Ins. Co.*, 480 Pa. 274, 409 A.2d 347 (1979) 11, 12

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 13

Bell Atlantic Corp. v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993) 19, 22

Blossom v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655 (1863) 11

Bowles v. *Superior Court*, 44 Calif. 2d 574, 283 P.2d 704 (1955) 12

Chancey v. *May*, Prec. Ch. 591, 24 Eng. Rep. 265 (Ch. 1722) 10

City of Hobart v. *Baum*, 237 Ind. 316, 145 N.E.2d 573 (1957) 12

City of New Orleans v. *Gaines' Adm'r*, 138 U.S. 595 (1891) 15

Collier v. *Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93 (3d Cir. 1992) 6

Table of Authorities continued

Page(s)

Felzen v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided court sub nom. California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999) ..... *passim*

Fong Sik Leung v. *Dulles*, 226 F.2d 74 (9th Cir. 1955) 8, 9

Franks v. *Bowman Transp. Co.*, 424 U.S.747 (1976) 13

FTC v. *Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) 6

Hansberry v. *Lee*, 311 U.S. 32 (1940) 12, 13

Hansen v. *Smith*, 395 P.2d 944 (Wyo. 1964) 12

Hinckley v. *Gilman, C. & S. R. R.*, 94 U.S. 467 (1876) 11

In re Cendant Corporation Prides Litigation, 243 F.2d 722 (3d Cir. 2001) 22

In re New Mexico Nat. Gas Antitrust Litig., 607 F. Supp. 1491 (D. Colo. 1984) 7

In the Matter of: Navigant Consulting, Inc., Securities Litigation, __ F.3d __, No. 01-2311, 2001 WL 1646846 (7th Cir. December 26, 2001) ..... *passim*

Kaplan v. *Rand*, 192 F.3d 60 (2d Cir. 1999) 22

Kaufmann v. *Annuity Realty Co.*, 301 Mo. 638, 256 S.W. 792 (1923) 12

Table of Authorities continued

Page(s)

Leigh v. *Thomas*, 2 Ves. Sen. 312, 28 Eng. Rep. 201 (Ch. 1751) 11

Marino v. *Ortiz*, 484 U.S. 301 (1988) 4, 5, 7, 8

Mexican Cent. R. Co. v. *Eckman*, 187 U.S. 429 (1903) 15

Mylett v. *Jeane*, 879 F.2d 1272 (5th Cir. 1989) 6

Phillips v. *Brandt*, 231 Minn. 423, 43 N.W.2d 285 (1950) 12

Sage v. *Railroad Co.*, 96 U.S. 712 (1877) 11

Smith v. *Barry*, 502 U.S. 244 (1992) 6

Smith v. *Sperling*, 354 U.S. 91 (1957) 15

Snyder v. *Harris*, 394 U.S. 332 (1969) 15

Supreme Tribe of Ben-Hur v. *Cauble*, 255 U.S. 356 (1921) 15, 16

Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 6

United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 25

Williams v. *Morgan*, 111 U.S. 684 (1884) 11

Table of Authorities continued

Page(s)

OTHER JUDICIAL MATERIAL:

Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732 ..... 7, 13, 23

STATUTES:

28 U.S.C. § 1332 15

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 STAT. 737, 15 U.S.C. § 77u 4, 19, 20, 21, 23

RULES OF COURT:

FED. R. APP. P. 1(b) 6

FED. R. APP. P. 3 ..... 3, 4, 5, 6

FED. R. APP. P. 3(a) 6, 16

FED. R. APP. P. 3(b) 6

FED. R. APP. P. 3(c) 6, 16

FED. R. CIV. P. 23(e) 7, 14

FED. R. CIV. P. 24 ..... 4, 21, 23, 25

FED. R. CIV. P. 26(a) 21

FED. R. CIV. P. 35 9

OTHER LEGISLATIVE MATERIAL:

H. R. CONF. REP. NO. 104-369, 104TH CONG. 1ST SESS. (1995) 20

Table of Authorities continued

Page(s)

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TREATISES:

NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS (3d ed. 1992) 14

WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1992) 8

YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) 9, 10, 11

ARTICLES:

Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983) 17

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Page(s)

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Table of Authorities continued

Page(s)

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Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994 17

BRIEF OF AMICI CURIAE CHARLES L. GRIMES *ET AL.* IN SUPPORT OF PETITIONER

I. Interest of the Amici Curiae

Consents of the petitioner and the respondents to the filing of this brief are being lodged with the Clerk.[1]

These amici curiae have a direct interest in the present case because its outcome will directly govern a major issue in a Seventh Circuit case in which they were unsuccessful appellants and which they are bringing to this Court on petition for certiorari. Like the petitioner here, they were unnamed class members in a class action, who properly appeared in the trial court (the District Court for the Northern District of Illinois) and objected to a proposed settlement. Their objections were denied, the settlement was approved and judgment entered, and they appealed to the Seventh Circuit. The Seventh Circuit is one of those which require that an unnamed party to a class action formally intervene and become a named party in order to appeal denial of objections to a settlement. *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided*

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[1] No party or counsel for a party authored any part of this brief. No person not an amicus made any monetary contribution to the preparation or submission of this brief.

court sub nom. California Public Employees' Retirement System v. *Felzen*, 525 U.S. 315 (1999).[2] They accordingly moved to intervene in the trial court, but their motion was denied. They appealed the denial of intervention and conditionally appealed the rejection of their objections to the settlement, suggesting also that the Seventh Circuit reconsider and overrule *Felzen*. The court affirmed the denial of intervention and refused to reconsider *Felzen*. *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, ____ F.3d ____, No. 01-2311, 2001 WL 1646846 (7th Cir. December 26, 2001), reprinted in the Appendix hereto. Speaking for the court, Judge Easterbrook said that *Felzen* "is not a candidate for reconsideration. . . . The ball is in another Court, which has indicated an inclination to take a new look at the subject. [Citing the instant case.] That is the right forum for further debate." App. 5a.

So, consonant with Judge Easterbrook's suggestion, amici hope to make a contribution to the "further debate" in this "forum."

Judge Easterbrook's opinion in *Navigant* rests on a somewhat different rationale from that of the court below in the instant case: focusing, for example, on what he called a "formal position" regarding the meaning of "parties" under FED. R.

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[2] Actually, *Felzen* involved a stockholder's derivative suit. But the Seventh Circuit regards its decision in *Felzen* as governing both types of action. See *Felzen*, 134 F.3d at 875, 876. As noted herein, the oral argument in this Court in that case addressed whether the rule for appealing rejection of objections to settlement of such a suit should be the same as the rule for appealing rejection of objections to settlement of a class action.

APP P. ("FRAP") 3 rather than on what he called "policymaking by judges," which he regarded as the basis for the Fourth Circuit's decision in the instant case, App.5a; and rejecting the view of the court below in this case that the question is one of "standing." App. 6a. The *Navigant* opinion offers several propositions that might be thought to support the result below in the present case even though they might not have been made by the Fourth Circuit. Amici respectfully suggest that it may be helpful to the Court to address arguments of this kind from *Navigant*. This brief will therefore concentrate on those points and will try not to duplicate arguments that the petitioner can be expected to make here.

We note in addition that *Navigant* makes it clear that the parties in the instant case misapprehended Seventh Circuit law with respect to intervention for purposes of appeal. See Reply for the Petitioner at 8 ("the rule in the Seventh Circuit is that a class action objector has an effectively *per se* right to intervene, even after the settlement is consummated, in order to preserve his right to appeal as a formal 'party'"); Petition for Certiorari at 13; Brief in Opposition for Respondents at 15-16. But *Navigant* has now belied this optimistic interpretation, coming up with a significant new stumbling-block to appeal of rejection of objections to a settlement: a drastic "timeliness" requirement not previously imposed, which would effectively require formal intervention long before the settlement.

II. Summary of Argument

Neither the Federal Rules of Appellate Procedure nor this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), mandates that an unnamed class member in a class action intervene in the district court under FED R. CIV. P. 24 and become a named party, in order to appeal rejection of properly made objections to a settlement. *Marino* is wholly irrelevant; it deals with total strangers to the litigation; and even so, it merely says that intervention is "the better practice." As for FRAP 3, it need not be read as limiting appeals to named "parties" in the district court. It is long settled that various classes of person who are not named parties can legitimately appeal. Even if FRAP 3 did impose such a limitation, the word "party" has no fixed and rigid definition; in various circumstances it includes persons who are not named parties; and in particular, unnamed class members in a class suit have been regarded as "parties" from the inception of the modern class action in the early 1700s. Moreover, a class member who appears and presents objections is a "party" in every meaningful sense.

Requiring formal Rule 24 intervention in the district court in order to appeal rejection of properly presented objections to a class action settlement would interpose a wholly unnecessary burden on the analysis of settlements for their fairness. General policy considerations overwhelmingly favor the elimination of all such unnecessary obstacles, and in particular the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 STAT. 737, 15 U.S.C. § 77u ("PSLRA"), reflects a strong Congressional policy in favor of facilitating a searching

examination of class action settlements. The requirement of formal intervention will burden the appellate courts with appeals of denials of intervention, introducing collateral issues and diverting their attention from their proper function of reviewing the merits of settlements. If the Court should nevertheless conclude that intervention is required, it should be made clear to the lower courts that such intervention is of right and *pro forma*, that a post-judgment application is timely, and that the paperwork required in conventional interventions is unnecessary and should be dispensed with.

III. Argument

A. "Party" Is Not a Term With a Fixed Invariable Meaning, and Mechanical Interpretation of FRAP 3 and *Marino* v. *Ortiz*, 484 U.S. 301 (1988), as Permitting Appeals Only by Formal, Named Parties Is Incorrect.

Navigant is based on an inflexible, mechanical interpretation (a "formal position," Judge Easterbrook called it, App. 5a) of the word "parties" in FRAP 3. FRAP 3 limits appeals to "parties," *Navigant* says, and "parties," it holds in effect, means, and only means, formal parties named in the caption of the complaint in the district court.[3]

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[3] "Only parties may appeal from judgments entered in federal litigation. See FED. R. APP. P. 3; *Marino* v. *Ortiz*, 484 U.S. 301 (1988)." App. 1a. "Appellate Rule 3 limits appeals to parties, and in *Marino* the Supreme Court enforced that requirement." App. 5a. Appellants in *Navigant* "ignored that rule and attempted to appeal without becoming parties." App.1a.

But nothing in the language of FRAP 3 limits appeals to "parties," much less to formal named parties. In the first place, FRAP 1(b) is explicit that nothing in FRAP is to be construed "to extend or limit the jurisdiction of the courts of appeals." More specifically, FRAP 3(a), dealing with the filing of the notice of appeal, uses the generic term "appellant" and never refers to "parties." FRAP 3(b), dealing with joint or consolidated appeals, and 3(c), dealing with contents of the notice of appeal, both refer to "parties," but as there used the term necessarily refers to parties to the *appeal*. For it is indisputable that many categories of appellants who were not parties below are allowed to take an appeal and be listed in the notice of appeal. A familiar example is appeals of sanctions imposed on lawyers not themselves parties. *E.g.*, *Collier* v. *Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93, 94-95 (3d Cir.1992) (lawyer appealing sanction order must be listed in notice of appeal)[4]; *Mylett* v. *Jeane*, 879 F.2d 1272 (5th Cir. 1989); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989). Though compliance with Rule 3(c) is a jurisdictional prerequisite, its purpose, after all, is simply to give notice of who will be parties to the appeal. *Smith* v. *Barry*, 502 U.S. 244, 248 (1992); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988).

Notably, *FRAP 3(c)(3), dealing with class actions, does not mention "parties" at all* — much less "named parties." This provision — which, be it

[4] Note that *Collier* specifically holds that the term "party" in FRAP 3(c) includes such an appellant, who was clearly not a named party in the action appealed from.

noted, was not in the Rules at the time of *Felzen* (it was added in the amendments effective December 1, 1998) — provides rather that "the notice of appeal is sufficient if it names *one person qualified to bring the appeal as representative of the class.*" (Emphasis added). In light of FED. R. CIV. P. 23(e), this language can have no purpose save to encompass class members who have objected to a settlement. "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations," *In re New Mexico Nat. Gas Antitrust Litig.*, 607 F. Supp. 1491, 1497 (D. Colo. 1984); the function of objections, in other words, is to ensure that the settlement is fair, reasonable, and adequate to the class as a whole.[5]

Marino v. *Ortiz*, 484 U.S. 301 (1988) (per curiam), cited by Judge Easterbrook as confirming the wooden interpretation of "parties" (see footnote 2), has nothing whatever to do with the issue here.[6] That case dealt with total strangers to the litigation — persons who, while the settlement might affect them, had been participants in the case in no sense

[5] And not merely to "contest the faithfulness or honesty of the self-appointed plaintiffs," as the Seventh Circuit suggested in *Felzen* v. *Andreus*, 134 F.3d at 876.

[6] "Q: . . . *Marino* v. *Ortiz* involved . . . people who were genuinely antagonistic. . . . They were certainly not represented by the black plaintiffs who were suing. . . . But for the Seventh Circuit to say it follows like the night the day, it didn't. Whatever — whatever the answer may be, it didn't come out of that decision." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 56-57.

whatever, as class members or in any other capacity. Understandably, this Court held that it was "the better practice" to require them to intervene as parties in order to appeal. 484 U.S. at 304. Even with respect to such true non-parties, the leading commentators have not interpreted *Marino* as mandating intervention in all circumstances. "[T]he brief statement that better practice demands intervention should not be taken to establish a requirement applicable to all circumstances." 15A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1 at 130 n.52 (2d ed. 1992); *id.* at 122 n.34 (same). "Appeal by way of a simple notice of appeal should be available . . . to nonparties directly bound or affected by an order." *Id.* at 132.

Indeed, there is no general, rigid, "formal" definition of the word "party." Its meaning in any particular context depends on the circumstances. In Judge Boldt's words:

> "In its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not. In a variety of situations persons not named in cause title [*sic*] and not appearing in any formal capacity have been held to be 'parties' or 'a party to' litigation in which they were concerned or affected."

Fong Sik Leung v. *Dulles*, 226 F.2d 74, 81 (9th Cir. 1955) (footnotes omitted). Each case requires examination of the circumstances in order to ascertain how the term is meant. Thus, *Fong Sik*

Leung itself dealt with whether the named plaintiff, a father suing as guardian ad litem on behalf of his minor son to establish the son's citizenship, was a "party" within the meaning of FED R. CIV. P. 35, authorizing the district court to order physical examination of a "party."[7] On the basis of the history of Rule 35 and of federal courts' historic power (or lack of it) to require such examinations, the court held that even though the father was the named plaintiff, he was not a "party" within the intendment of the Rule.

B. History, Established Usage, and Policy Considerations All Support Inclusion of Unnamed Class Members as "Parties" For Purposes of Appeal.

1. Unnamed Class Members Have Been Considered "Parties" Since the Inception of the Modern Class Action Nearly 300 Years Ago.

Throughout the nearly 300-year history of the modern class action, unnamed class members have been considered to be parties; often called "unnamed parties" or the like — by contrast with "named parties" or "parties by name" or "made parties" — but *parties* nevertheless.

The modern class action (as opposed to medieval actions to establish villagers' rights to use of common land and the like, see generally YEAZELL,

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[7] Before 1970, Rule 35 authorized only examination of parties. See Notes of Advisory Committee on 1970 Amendments to Rules ("Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination").

FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)) stems from *Chancey* v. *May*, Prec. Ch. 591, 24 Eng. Rep. 265 (Ch. 1722) (Lord Parker, L.C.). Having its origin in the speculative fever of the era of the South Sea Bubble, that case foreshadowed latter-day class actions on behalf of disaffected investors. Two partners in a venture sued "in behalf of themselves, and all other proprietors and partners" — evidently nearly 800 in number — ". . . except the defendants, who were the late treasurers and managers, . . . to call them to an account for several misapplications, mismanagements, and embezzlements, of the copartnership . . . ." In the words of the report: —

> "The defendants demurred, for that all the rest of the proprietors were not made parties, and so every one had the same right to call them to an account, and then they might be harassed and perplexed with a multiplicity of suits; but the demurrer was disallowed,
>
> "1*st*, Because it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, *and so all the rest were in effect parties*.
>
> "2*dly*, Because it would be impracticable to make them all *parties by name*, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be *made parties*."

(Emphasis added.) The case thus set forth the same rationalia as justify the class action device today:

that one or a few members of a class sharing a common interest represent the whole; and the unwieldiness that would result if all members of a large class were "made parties" or "parties by name." And it recognized clearly that the unnamed class members were "in effect parties."

The Court of Chancery drove the latter point home a few years later:

> "No doubt but a bill may be by a few creditors in behalf of themselves and the rest, to have an account of real and personal estate for relief of all; and then the decree lets in all the others; and *they are considered as parties*, that bill not being confined to a select number . . . ."

Leigh v. *Thomas*, 2 Ves. Sen. 312, 313, 28 Eng. Rep. 201 (Ch. 1751) (Strange, M.R.) (emphasis added).

Though an invention of English Chancery, over succeeding decades (and centuries) the class action saw greater development in the United States than in the mother country. See generally YEAZELL, *supra*. And American cases frequently speak of unnamed class members as "parties."[8] *E.g.*, *Allessandro* v. *State Farm Mut. Auto. Ins. Co.*, 480

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[8] Not, be it noted, merely "quasi-parties" as in *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655 (1863) (bidder for property in foreclosure sale allowed to appeal trial court's refusal to complete and confirm sale) and its progeny, such as *Hinckley* v. *Gilman, C. & S. R. R.*, 94 U.S. 467 (1876) (receiver); *Sage* v. *Railroad Co.*, 96 U.S. 712 (1877) (persons interested in order confirming sale); *Williams* v. *Morgan*, 111 U.S. 684 (1884) (objectors to trustee charges).

Pa. 274, 279 n.9, 409 A.2d 347, 350 n.9 (1979) ("[A]ll members of a class action are 'parties plaintiff' upon the filing of the complaint"); *Hansen* v. *Smith*, 395 P.2d 944, 945 (Wyo. 1964) ("[T]he parties-plaintiff include both the persons identified by names as such and also those specifically referred to as members of the class . . ."); *City of Hobart* v. *Baum*, 237 Ind. 316, 318, 145 N.E.2d 573, 574 (1957) ("We recognize the fact that an unnamed member of the class is a party to the suit from the beginning, in the sense that he cannot file a separate suit based upon the subject-matter of the class action"); *Bowles* v. *Superior Court*, 44 Calif. 2d 574, 586, 283 P.2d 704, 712 (1955) (en banc) (unnamed class members are "represented parties; hence they are parties in legal effect"); *Phillips* v. *Brandt*, 231 Minn. 423, 428, 43 N.W.2d 285, 289 (1950) ("The motion here is not to bring in additional parties, but to designate by name parties already plaintiffs by virtue of the fact that they are within the class for which the action was brought"); *Kaufmann* v. *Annuity Realty Co.*, 301 Mo. 638, 256 S.W. 792, 797 (1923) (unnamed class members were "in effect plaintiffs . . . in effect parties").

In the seminal case in this Court setting forth the due process requirements of a class action, *Hansberry* v. *Lee*, 311 U.S. 32 (1940), Chief Justice Stone spoke of unnamed class members as "parties" no less than eight times, referring to "determining whether the absent *parties* are bound by the decree," 311 U.S. at 42; whether a procedure "fairly insures the protection of the interests of absent *parties*," *ibid.*; "the *parties* present and those who are absent," *id.* at 43; "the *parties* who are represented though absent," *ibid.*; "due regard for the protection of the

rights of absent *parties*," *id.* at 44; "that protection to absent *parties* which due process requires," *id.* at 45; "[t]he doctrine of representation of absent *parties* in a class suit," *ibid.*; and "the fraudulent and collusive sacrifice of the rights of absent *parties*," *ibid.*; contrasting such *absent* parties with "*formal* parties to the suit," *id.* at 42. (Emphasis added in each quotation.) And see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 551 (1974): "[T]he claimed members of the class stood as *parties to the suit* until and unless they received notice thereof and chose not to continue." "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been *parties* had the suit been permitted to continue as a class action." *Id.* at 554. *Cf. Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) (mooting of named plaintiff's claim does not moot class action).

As one Justice said in oral argument in this Court in *Felzen*, contrasting the status of unnamed class members in a class action with that of non-suing shareholders in a derivative action:

> "Q: But in class actions, they're non-named parties, but they're parties. Isn't that so? The — in a regular class action, there's a representative of a class, but all the members of the class are parties. They're not named parties, but they're parties . . . ."

Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 11-12; see *id.* at 22-23.

Finally, an unnamed class member who has actually come in and lodged objections to a

settlement is a "party" in every practical sense. Rule 23(e) requires that he be given notice and an opportunity to be heard. He has a right to present his objections, and the right to conduct discovery and present evidence under proper control of the court to avoid abuse. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992). He can exercise those rights without going through the formality of intervention.[9] At the very least, he is a *litigant* for purposes of presenting his objections — even without intervening. Such a *litigant* should have the same right as all other litigants to be an *appellant* — to have a decision rejecting his objections reviewed by an appellate court without being made to jump through additional, unrelated, hoops.[10]

Before leaving this topic, we note one argument in the *Navigant* opinion that is particularly weak. It suggests that unnamed class members are not parties because "if they were, their citizenship would count for purposes of the complete-diversity

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[9] Thus, the kind of exploration which the court in *Navigant* suggested could have been carried out if the objectors had intervened, App. 6a - App. 7a, can just as well be conducted without intervention in a properly managed fairness hearing. (If actually relevant, of course; in *Navigant* itself the asserted need for such discovery was a belated suggestion first brought up as a makeweight argument on appeal.)

[10] The court below in this case considered ability to appeal as a question of "standing." The *Navigant* opinion disagrees, limiting the term "standing" to the "injury in fact" type of standing that underlies an Article III case or controversy. App. 6a. This appears to us to be a semantic debate that does not affect the outcome.

requirement in suits under 28 U.S.C. sec. 1332." App. 5a. With respect, this is simply wrong.[11] For all representative suits — not just class actions — it has long been established that "the jurisdiction of the Federal courts depends, not on the relative situation of the *parties concerned in interest*, but on the relative situation of the *parties named in the record*." *Mexican Cent. R. Co.* v. *Eckman*, 187 U.S. 429, 434 (1903) (emphasis added).[12] "[W]e have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent . . . ." *City of New Orleans* v. *Gaines' Adm'r*, 138 U.S. 595, 606 (1891). As Justice Black put it in *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969):

> "Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are *named* parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921)."

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[11] *Smith* v. *Sperling*, 354 U.S. 91 (1957), cited by the court in connection with this proposition, deals not with class or other true representative actions, but with the three-way alignment of *named* parties in a shareholder's derivative suit (shareholder, corporation, defendant).

[12] Unless the named party is "a mere figurehead, a nominal party," a "merely formal part[y]," 187 U.S. at 433-34; which a class representative clearly is not.

(Emphasis added). (*Supreme Tribe of Ben-Hur* confirms that class actions follow not only the general principle that the citizenship of unnamed parties is disregarded, but also the further principle that diversity is measured by the original complaint, so that jurisdiction survives the later addition of a non-diverse class member as a named party).

2. Policy Considerations Strongly Favor Liberal Appeals of Rejections of Objections to Class Action Settlements, Without the Encumbrance of Formal Intervention.

Whether the issue here be regarded as interpretation of the word "party" in FRAP 3(c), as interpretation of the word "appellant" in FRAP 3(a), as interpretation of the scope of the language regarding class actions in FRAP 3(c)(3), or as a policy determination, the key considerations are the same: the role of objectors to class settlements in assuring justice, and the proper spheres of the trial and appellate courts respectively.

(a) Obstacles Should Not Be Put in the Way of Searching Examination of Class Action Settlements, in Light of the Widely Recognized Potential for Collusion and the Public Policy Clearly Expressed by Congress.

Commentators, and many judges, have for years recognized the potential for corrupt class action settlements in which supposedly "representative" plaintiffs — often merely alter egos for lawyers

engaged full time in the trade — bargain away the rights of the class in exchange for generous legal fees. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School wrote in 1991, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, NEW YORK LAW JOURNAL, March 28, 1991, at 5 col. 1.[13] In 1994 the Chairman of the SEC noted that "virtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases," and urged that ways be found "to give shareholders greater control over their own litigation and curb potential conflicts of interest between class action lawyers and the shareholders they represent." Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994, at 3, 6.

The scandal spilled over into the general press. See, *e.g.*, Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, at A15. "Millions for Us, Pennies for You," trumpeted a headline in

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[13] See also, *e.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 26-33 (Summer 1985); Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983).

the New York Times in late 1993, with the subhead: "Suits on behalf of investors enrich lawyers. But what of their clients?" NEW YORK TIMES, December 19, 1993, Section 3, at 1. ("'The lawyers' interest shifts from protecting the investor to protecting the deal.'") See also Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny*, WALL ST. JOURNAL, October 28, 1992, at 1, col. 8; "*Coupon Clipping for Lawyers,*" WALL STREET JOURNAL, November 18, 1993, at A20 col. 1 ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in which all the real money goes to the lawyers. . . . Funny, we thought the justice system was supposed to have something to do with, well, justice.")[14]

It is to guard against precisely this abuse that Rule 23(e) requires that unnamed class members be given notice of a proposed settlement, so they can have a fair opportunity to object. After all, if they do not, who will? Once the settlement deal is cut, there are no longer adversaries before the court; the named parties have every incentive to defend the deal and none whatever to question it. (And realism compels recognition that the court itself will often be predisposed to see a case disposed of by settlement.) As Judge Friendly said in his eloquent dissent in

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[14] See also Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair*, WALL ST. JOURNAL, August 17, 1995, at B4; Baron, *An Asbestos Settlement With a Hidden Agenda*, WALL ST. JOURNAL, May 6, 1993, at A11, col. 3; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature*, WALL ST. JOURNAL, June 26, 1992, at 1, col. 1.

Alleghany Corp. v. *Kirby*, 333 F.2d 327 (2d Cir. 1964), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) (a derivative suit), for the settling parties —

> "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage. Once a settlement is agreed, the attorneys for the plaintiff shareholders link arms with their former adversaries to defend their joint handiwork. . . . All the dynamics conduce to judicial approval of such settlements."

333 F.2d at 347 (Friendly, J., dissenting.)[15]

Congress took note of the scandal, and after several years of hearings and investigations[16] enacted the PSLRA for class actions under the

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[15] "The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. . . . In seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on a settlement's merits." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (citations omitted).

[16] E.g., *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, S. HRG. 103-431, 103d CONG., 1st SESS. (1993).

securities laws. Among other provisions, it seeks to eliminate "professional lead plaintiffs" (and their professional lead lawyers and the attendant races to the courthouse) by providing for a court-selected lead plaintiff who in turn chooses lead counsel; cuts down on "fishing expedition" lawsuits; and, most significantly for the instant issue, requires extensive detail in settlement notices, including a statement of the recovery agreed on, a statement of the potential recovery, a statement and explanation of attorneys' fees to be sought, and a statement of the reasons for proposing the settlement. 15 U.S.C. § 77u-1(a)(7).

The reason for this last provision is obvious: to make it easier for class members to evaluate the proposed settlement so as to enable them to object if they feel they should do so. Thus, the conference committee quoted the testimony of a class member in two separate securities fraud lawsuits: "I feel that the settlement offer should have told the stockholders how little of their losses will be recovered in the settlement, and that this is a material fact to the shareholder's *decision to approve or disapprove the settlement*." H. R. CONF. REP. NO. 104-369, 104TH CONG., 1ST SESS. at 36 (1995) (emphasis added).

In other words, the PSLRA reconfirms, through provisions that transcend the merely procedural and in effect impose substantive limits, that it is the public policy of the United States to facilitate a searching examination of class action settlements; to impose what Judge Friendly in *Alleghany*, *supra*, called "a high standard with respect to disclosure at settlement hearings" and to subject arguments in favor of the settlement "to a most icy scrutiny." 333

F.2d at 347. (And though the PSLRA itself deals only with securities cases, identical policy considerations apply to all class actions.) Scrutiny at least as icy should be accorded to erection of obstacles, unrelated to the merits, to efforts by class members — whose rights, after all, will be determined and possibly cut off forever — to bring before the court perceived ways in which the settlement is not fair, reasonable, and adequate.

Foremost among these obstacles would be requiring formal intervention under FED. R. CIV. P. 24. It is expensive. It is burdened by elaborate paperwork, including the drafting of a separate complaint and the preparation of motions and briefs. It is hedged about with technicalities, such as having to litigate under Rule 24 such issues as timeliness and the adequacy of existing representation (an issue which has presumably already been addressed at the class certification stage, and presumably determined in the representative's favor), and opening up automatic disclosure under FED. R. CIV. P. 26(a). As noted *infra*, *Navigant* would often force class members to go through this process long before they even know whether they will wish to object. None of these has any relation to the merits of the settlement: which is the only thing the objecting class member has any interest in — *and the only thing the appellate court should be interested in*.

(b) Appellate Courts Should Not Abdicate Their Responsibility To Do Substantive Justice in Favor of Gatekeeping Determinations by Lower Courts Unrelated to the Merits of a Settlement.

The role of the appellate courts in examining class action settlements is vital. "Because a district court may overlook a 'mutual indulgence' [quoted from *Bell Atlantic Corp.* v. *Bolger*, footnote 15 *supra*], appellate review advances the policy of assuring the fairness to shareholders that underlies the requirement of court approval." *Kaplan* v. *Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative suit). "Th[e] unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards." *In re Cendant Corporation Prides Litigation*, 243 F.2d 722, 728 (3d Cir. 2001).

Appellate courts should be focused on the merits of cases, not on peripheral matters. Requiring objectors to intervene in order to appeal will not cut down on the number of appeals; it will just mean that courts of appeal will be faced with appeals from denials of intervention in addition to appeals from denials of objections. The primary issue will then be whether it was an abuse of discretion to deny intervention, not whether the settlement was fair, reasonable, and adequate to the class as a whole. As a Justice pointed out at oral argument in *Felzen*, there would then be "no sure right of review other

than on the abuse of discretion standard." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 52. In the real world, as a Justice pointed out at oral argument in *Felzen*, district judges are going to look at the objections. If they do not like them, they are likely to deny intervention. *Id.* at 42. But the key question of fairness of the settlement will then be reviewed by the court of appeals only after having to deal with "14 other issues that could be crafted out of Rule 24." *Id.* at 44. Appellate courts should not allow trial courts to be their gatekeepers in this fashion.

Navigant affords a good example. The objectors in that case had pointed out a square violation of the PSLRA: not something that might or might not be deemed a violation in light of a subjective judgment, but a flat violation of the PSLRA's requirement that the settlement notice specify the amount of fees and costs class counsel would seek. 15 U.S.C. § 78u-4(a)(7). The district court's disregard of this plain requirement cried out for appellate correction; that is what a circuit court's job description is all about. (And awareness of this is a powerful incentive for district courts to be careful.) Instead, the circuit court entered into a lengthy dissertation on the principles of "timeliness" under Rule 24.

This emphasis on supposed "timeliness" in *Navigant* is particularly troublesome. In the real world, objectors will not normally know what a settlement will involve until they receive the notice. On the reasoning in *Navigant*, they will have no choice but to seek formal intervention, with the attendant expense and burdensome paperwork, at

that point, just to protect their ability to seek review if their objections are rejected. Indeed, under *Navigant* even that may be "untimely": *Navigant* encourages a searching examination into the history of the objector's knowledge, and suggests pushing the "timeliness" deadline as far back as the objector can be shown to have had some degree of awareness. Itself conducting such a search, the court in that particular case suggested a "timeliness" deadline seven months before the date of the order approving the settlement. App.3a-5a. That is not the kind of exercise appellate courts should be engaged in.[17]

C. If Nevertheless the Court Should Conclude That Intervention Is Necessary, No More Should Be Required Than a Pro Forma Post-Judgment Intervention As of Unconditional Right With Minimum Paperwork.

Finally, amici submit that fairly included in the question presented is the question of what should be required of a class member to intervene in order to appeal if the Court should nevertheless decide that such intervention is necessary. For all the same reasons just discussed, amici submit that nothing more should be required than a *pro forma* intervention, to satisfy whatever technical requirements may be perceived. It should be made clear to the lower courts that such intervention must

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[17] As the *Navigant* opinion shows, the objectors in that case had not slept on their rights. Well before the settlement notice was sent out, one of the objectors had filed his own lawsuit. And they had timely responded with their objections to the settlement notice.

be granted as of unconditional right; that a motion for such intervention is timely even if made after judgment; and that the paperwork normally required under FED. R. CIV. P. 24 — such as "a pleading setting forth the claim or defense for which intervention is sought," and a showing that "the applicant's interest is [not] adequately represented by existing parties" — should not be required.

Indeed, as to "timeliness" this result is clearly mandated by *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). The Court there emphasized that in appraising "post-judgment intervention for the purpose of appeal," "the critical inquiry in every such case is whether in view of all the circumstances the intervenor acted *promptly after the entry of final judgment*." 432 U.S. at 395-96 (emphasis added). And the governing factor for the Court was that the intervenor had taken action within the 30-day limit for the filing of a notice of appeal, and hence the "motion to intervene was timely filed and should have been granted." 432 U.S. at 396. The suggestion in the *Navigant* opinion that the decisive element in *United Airlines* was that the intervenor had not "learn[ed] until after judgment of the circumstance ... that calls for intervention," App. 2a, is, with respect, simply wrong. Rather, as the dissent in *United Airlines* makes clear, that case stands for the proposition that intervention filed within the 30-day time limit for filing a notice of appeal is "timely under Rule 24 as a matter of law." 432 U.S. at 399.

IV. Conclusion

No intervention should be required of a class member in order to appeal rejection of properly presented objections to a settlement. If intervention is necessary, it should be merely *pro forma*.

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No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CITIBANK (SOUTH DAKOTA), N.A., AS AMICUS CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. NOTHING IN RULE 23 SUGGESTS THAT APPEALS BY CLASS MEMBERS WHO OBJECT TO A SETTLEMENT SHOULD BE AN EXCEPTION TO THE REPRESENTATIVE NATURE OF CLASS ACTIONS 3

II. INTERVENTION IN ACCORDANCE WITH RULES 23 AND 24 IS THE APPROPRIATE MECHANISM FOR DETERMINING THE RIGHT TO APPEAL A JUDGMENT ENTERED ON A CLASS ACTION SETTLEMENT 9

A. The Concerns Cited To Justify Appeals by Non-Named Class Members Are Best Addressed by Application of Rule 23 10

B. Petitioner's Objections to Use of the Intervention Procedure in This Context Are Insubstantial 16

C. Allowing Unfettered Individual Appeals by Objectors to Class Action Settlements Imposes Significant Costs 18

TABLE OF CONTENTS—Continued

Page

III. ARGUMENTS FOR THE EXPANSION OF APPEAL RIGHTS FROM NAMED TO NON-NAMED CLASS MEMBERS SHOULD BE MADE AND ADDRESSED THROUGH THE PROCESS FOR AMENDING THE FEDERAL RULES 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Donnelly v. Glickman, 159 F.3d 405 (9th Cir. 1998) 16
Duhaime v. John Hancock Mutual Life Insurance Co., 183 F.3d 1 (1st Cir. 1999) 19
In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000) 16
In re Thompson, 965 F.2d 1136 (1st Cir. 1992) 14
Karcher v. May, 484 U.S. 72 (1987) 3, 4
Marino v. Ortiz, 484 U.S. 301 (1988) 3, 15
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7
Officers for Justice v. Civil Service Commission, 688 F.2d 615 (9th Cir. 1982) 7
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 7
People v. Tahoe Regional Planning Agency, 792 F.2d 775 (9th Cir. 1986) 14
Twelve John Does v. District of Columbia, 117 F.3d 571 (D.C. Cir. 1997) 16
United States Postal Service v. Brennan, 579 F.2d 188 (2d Cir. 1978) 14
Williams v. Morgan, 111 U.S. 684 (1884) 4, 5

STATUTES

Fed. R. App. P. 3(c) 4, 9
Fed. R. Civ. P. 19-21 5
Fed. R. Civ. P. 23(a) 5, 6, 12
Fed. R. Civ. P. 23(b) 13
Fed. R. Civ. P. 23(b)(3) 6
Fed. R. Civ. P. 23(c)(1) 13
Fed. R. Civ. P. 23(d) 6, 11
Fed. R. Civ. P. 23(d)(2) 7, 13, 16
Fed. R. Civ. P. 23(d)(3) 7, 15
Fed. R. Civ. P. 23(e) 7, 11, 13

TABLE OF AUTHORITIES—Continued

Page(s)

Fed. R. Civ. P. 23(f) 8
Fed. R. Civ. P. 24(a)(2) 14
Fed. R. Civ. P. 24(c) 16
Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence* (Aug. 2001) 20, 21

BOOK, ARTICLES & TREATISES

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356 (1967) 6

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INTEREST OF AMICUS[1]

Amicus Citibank (South Dakota), N.A., is a major issuer of credit cards. As such, it has considerable experience as a defendant in class-action litigation. In particular, Citibank is presently defending, in three related appeals that are pending before the Ninth Circuit, the settlement approved by the district court in a nationwide class action challenging certain payment-crediting practices. Those appeals include ques-

[1] Counsel for Citibank authored this brief in its entirety. No person other than Citibank or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' written consent to the filing of this brief has been filed with the Clerk.

tions concerning what type of participation in the district court is necessary to support an objector's standing to appeal. Indeed, an appellant in that case has filed an *amicus* brief supporting petitioner in this case. Citibank accordingly has a significant interest in the proper resolution of this case.

SUMMARY OF ARGUMENT

Class actions often end in settlement. Such a settlement is negotiated by the named parties who have been certified by the district court to represent the class. Members of the class who object to the settlement are entitled to notice and to an opportunity to present their objections to the district court, and the settlement cannot become effective until the court approves it as fair and adequate. Objectors who are not named parties to the suit should not be entitled to appeal that determination, advancing a position contrary to that of the certified class representatives, unless they have separately intervened in the action.

We focus on two considerations: The representative nature of class actions, and the special context of settlement. Rule 23 makes clear that class litigation is to be conducted by named parties as representatives of the class, subject to a variety of express safeguards designed to protect the class. In the case of settlement, those safeguards include notice, an opportunity to raise objections in the district court, and an independent evaluation of the settlement by the district court. The rule also expressly contemplates intervention by class members who seek a more active role in the litigation. Nothing in the rule suggests that once the class's certified representatives have reached a settlement, and the district court has approved it, individual class members who have not sought to intervene under Rule 24 should nonetheless be allowed to appeal in order to challenge the agreement and positions adopted by their class representatives.

Petitioner suggests that class members who have not intervened should nonetheless be permitted to appeal either to

pursue their individual interests, or to challenge a settlement as inadequate from the point of view of the class. Both individual and class interests are fully protected, however, by the protections built in to Rule 23 — including the opportunity to seek intervention under the standards set out in Rule 24. Those standards focus on the existence of a legitimate interest on the part of the intervenor, and whether intervention is appropriate in order to protect that interest. A ruling on a motion to intervene therefore ensures that the district court will have an opportunity to address the issues most relevant to whether a particular class member should be allowed to appeal, and allows for the building of an adequate record to permit review of that determination, if necessary, by the court of appeals.

Petitioner's arguments concerning the burdens imposed by an intervention requirement are unpersuasive. Moreover, the costs of allowing unfettered objector appeals, without any district-court gatekeeping, are substantial. In any event, the policy arguments for and against allowing such appeals are best directed to those responsible for framing amendments to the federal rules — who are, in fact, actively considering draft amendments to Rule 23. In the absence of such an amendment, the better course for this Court is to adhere to the text and structure of the existing rules, including the traditional mechanism of intervention.

ARGUMENT

I. NOTHING IN RULE 23 SUGGESTS THAT APPEALS BY CLASS MEMBERS WHO OBJECT TO A SETTLEMENT SHOULD BE AN EXCEPTION TO THE REPRESENTATIVE NATURE OF CLASS ACTIONS

It is "well settled" that, as a rule, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *see also, e.g., Karcher v. May*, 484 U.S.

72, 77 (1987); Fed. R. App. P. 3(c) (cited in *Marino*). Of course, "[o]ne who is not an original party to a lawsuit may . . . become a party by intervention, substitution, or third-party practice." *Karcher*, 484 U.S. at 77. The district court in this case denied petitioner's motion to intervene as untimely. *See* Pet. App. A9. The question before the Court is whether petitioner nonetheless had a right to appeal from the district court's judgment approving, over petitioner's objection, the settlement of a class action in which petitioner was an unnamed member of the class.[2]

The proper answer to that question is no, because successful intervention should be a predicate for appeal on the merits of the settlement. Petitioner argues principally (Br. 16-28) that he is a "party" to this case, for purposes of appeal, because his legal rights with respect to the subject matter of the action are likely to be finally determined by the judgment. He also relies (*e.g.*, Br. 20-23) on a variety of cases in which particular litigants have been permitted to appeal particular orders. We agree with respondents that the claim-preclusive effect of a class-action judgment does not, by itself, make petitioner a "party" to the proceeding.[3] We also agree that the "quasi-party" and "nonparty" cases that petitioner cites (*id.*) are readily distinguishable from this one.[4] Rather than revisiting all of the arguments joined in the

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[2] There is no dispute that petitioner had a right to appeal the denial of his motion to intervene. The court of appeals unanimously sustained the district court's decision in that regard. Pet. App. A10-A14, A30.

[3] Among other things, the logic of petitioner's argument would lead to the conclusion that an unnamed class member has the right to participate as a party, without intervening, in every aspect of the litigation, and the right to appeal from a judgment that resulted from fully contested litigation, rather than from a settlement. Those are not tenable conclusions.

[4] Petitioner relies (Br. 21-22), for example, on *Williams v. Morgan*, 111 U.S. 684 (1884). The premise of that reliance is that the parties allowed to appeal, who objected to the amount of compensation awarded trustees in the proceeding in the trial court, "had not formally intervened." Although the terminology of 1884 may not correspond seamlessly with that of the modern federal rules, as a substantive matter that premise is clearly wrong. *See id.* at 691-94 (objectors' participation in the trial court was hotly contested; the objectors "filed applications to the court for leave to be heard," and "[t]he court granted both of these applications"); *id.* at 696 ("As to the right of [the objectors] to appeal, this depends on their right to intervene and contest the allowances to the trustees; or rather on the power of the [trial] court to allow them to do so."; trial court properly granted their "formal applications" to be heard); *id.* at 698-700 (objectors had right to participate below "under the leave of the court"; "*quasi* parties" are ones "incidentally interested" in litigation, who are "allowed to intervene"; objectors were so situated, on the particular facts, that they had a right to participate below "by leave of the court," and then to appeal from the decree).

The cases petitioner cites pre-date the federal rules and their regularization of the intervention mechanism. The "quasi-party" cases involve allowing a party who is otherwise *unrepresented* in the action, such as a bidder at a foreclosure sale, to join it in order to protect some individual interest. As we discuss below, the class action is a *representative* action, in which the interests of objectors, as members of the class, are already at least putatively represented. If an objector challenges the adequacy of that representation (in the context of settlement or otherwise), the intervention mechanism allows him or her to seek direct participation in the case.

principal briefs, however, we will focus on two considerations that we believe are critical here.

First, the class-action context differs radically from the normal model of individual-party litigation. Class actions are governed by the special standards set out in Rule 23 of the Federal Rules of Civil Procedure. They may proceed as such only if the district court specifically determines, among other things: (i) that "the class is so numerous that joinder of all members [as traditional "parties" to the action, *see* Fed. R. Civ. P. 19-21] is impracticable"; (ii) that "the claims or defenses of the representative parties are typical of [those] . . . of the class"; and (iii) that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In many cases the district court must also expressly conclude "that a class action is superior to other available methods for the fair and efficient adjudication of

the controversy" — after taking into account, among other factors, "the interest of members of the class in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3). In short, unlike ordinary litigation, in which each "party" is the final judge of its own interests, class actions are, by definition, *representative* actions. In every action that proceeds to a class judgment, the district court has affirmatively determined, under standards defined by law, that it is both fair and most efficient for the case to be litigated by the class members who are specifically *named* as parties, "as representative parties on behalf of all." Fed. R. Civ. P. 23(a); *see also* Rule 23(d) (confirming district court's power to enter appropriate procedural orders to ensure fairness and efficiency of class litigation).[5]

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[5] In addition to the threshold requirements for class certification, Rule 23 provides a number of other express safeguards for non-named class members. In an action certified under Rule 23(b)(3), for example, non-named class members must (so far as possible) be provided with individual notice of the action; notice that they have the right to opt out of participation in the class, thus preserving any right they may have to proceed individually; and notice that if they choose to remain part of the class, they may nonetheless "enter an appearance [in the action] through counsel," and thereby receive court papers. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 392 & n.137 (1967) (suggesting that the right to appear entitles the non-named class member's counsel "to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under rule 24, which is not automatic and requires a showing.") In all class actions, the district court is specifically given authority to "requir[e], for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action," and to "impos[e] conditions on the representative parties or on intervenors." Fed. R. Civ. P. 23(d)(2)-(3).

Second, the question presented in this case involves class actions that have been concluded in the district court by *settlement.* Rule 23 deals expressly with settlements, requiring that a class action "not be dismissed or compromised without the approval of the [district] court," after notice to all members of the class. Fed. R. Civ. P. 23(e). The notice required by the rule gives class members who are not named parties the opportunity to examine a proposed settlement, and, if they wish, to comment on or object to the proposal while it is under consideration by the district court. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *cf.* Fed. R. Civ. P. 23(d)(2) (discussing district court's power to require that class members be given notice of "the proposed extent of the judgment" and an opportunity to comment on the adequacy of class representation, to intervene, or "otherwise to come into the action"). Even if no objection is made, Rule 23(e) imposes on the district court an obligation to assure itself that any settlement it approves is fair and reasonable. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999) (stating that Rule 23(e) requires "that any settlement is fair in an overriding sense"); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable."). Nothing in Rule 23, however, addresses the question of appeal from a judgment approving a class-action settlement, or suggests that the action ceases to be a representative one for purposes of such an appeal.

By its terms, then, Rule 23 contemplates actions that are fundamentally collective and representative in nature. That principle is balanced, to a defined extent, by express protections for the interests of class members other than the named plaintiffs or defendants. Those protections include, for example, opt-out rights in many cases, or opportunities for unnamed class members to participate in various ways in the

district court proceedings. The rule makes no mention, however, of appeals by unnamed class members — either in general, or in its provision relating specifically to settlements.[6]

It seems apparent that a completely silent class member, who has not participated in any way in the district court litigation, should not, merely by virtue of being in the class, be deemed a separate "party" entitled to pursue a personal, independent appeal to advance positions contrary to those advanced for the class by its certified representatives. Petitioner, though coy in many respects, does not himself make any argument for independent appeal rights on behalf of such silent class members. And such an appeal would be inappropriate even though the class member will generally be bound, as part of the class, by the district court's judgment. Thus, being bound by a judgment, as a member of a class represented by a duly certified representative, is not by itself sufficient to impart "party" status for purposes of an independent, personal appeal.

An unnamed class member might become involved in a proceeding without intervening by, for example, submitting a statement of objection or approbation about a settlement or some other action by the class representative or the court. The rules, however, provide no basis for an unnamed class member who does not intervene to pursue a separate appeal as an independent "party." And if *some* degree of participation short of intervention will suffice to permit an appeal, it is difficult to see where the line should be drawn, or on what principle or authority it would be based.

Accordingly, as a matter of textual analysis, the better view is that an unnamed class member is not a "party" entitled to his own separate appeal from a class-action judgment. *See* Fed. R. App. P. 3(c) (cited in *Marino*, *supra*.) Even,

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6 The rule does expressly address appeals, but only to provide that a court of appeals may allow immediate appeals of orders granting or denying class certification. Fed. R. Civ. P. 23(f). Such appeals would, as a matter of course, be taken or defended by the named parties.

however, if the Court concludes that such an analysis is insufficient, by itself, to decide this case, any functional analysis must also focus both on the special context of representative class actions under Rule 23, and on the special circumstance of appellate attack by class members who are neither admitted below as parties nor certified as class representatives, on a settlement that has been concluded by the representatives and reviewed and approved by the district court.

II. INTERVENTION IN ACCORDANCE WITH RULES 23 AND 24 IS THE APPROPRIATE MECHANISM FOR DETERMINING THE RIGHT TO APPEAL A JUDGMENT ENTERED ON A CLASS ACTION SETTLEMENT

In considering whether the representative nature of class-action litigation should be disregarded for purposes of allowing settlement appeals without intervention, it is worth emphasizing that one would not normally expect appeals on the merits in cases that have been *settled*. One of the signal benefits of settlement — both for the parties who must determine whether to compromise their claims and defenses, and for the judicial system — is the termination of litigation. Once a fairly represented party has agreed to settle a claim or to forgo a defense, both the opposing party and the courts should ordinarily be entitled to assume that the matter has been concluded.

That assumption is particularly important to both plaintiffs and defendants in large or complex class action-suits (such as the present case), in which settlements typically reflect extensive negotiation, based on compromises, with and among the duly constituted representatives of several classes or sub-classes of potential claimants. And it is perfectly reasonable in the context of Rule 23. The rule provides extensive protections for non-named class members, including notice of and the opportunity to object to any proposed settlement, and an independent evaluation of any such objections and the settlement by the district court. The question here,

then, is what, if any, special circumstances might justify allowing an appeal by an unnamed class member, for the purpose of challenging an otherwise final settlement.

A. The Concerns Cited To Justify Appeals by Non-Named Class Members Are Best Addressed by Application of Rule 23

Petitioner suggests two circumstances in which an appeal by an unnamed class member might be justified. First, he argues that a settlement may be inadequate to protect a class member's individual interests, and that the member should have a right to appeal such a settlement because the judgment will bind him. *See, e.g.*, Pet. Br. 29-32. Second, he argues that a settlement negotiated by the named class members and their counsel may be inadequate from the point of view of the whole class (or an important sub-class). *See, e.g.*, Pet. Br. at 32-36.

1. The first concern is simply answered. To begin with, in the many class actions certified under Rule 23(b)(3), each class member must (to the extent practicable) be given not only individual notice of the action, but the right to be excluded from the class, remaining instead the master of his or her own cause. That option fully protects each class member's rights as an individual. A member who chooses not to opt out should not be permitted to challenge a class settlement reached through the collective procedures of Rule 23, on the ground that it takes insufficient account of his or her individual interests, if the applicable standards for intervention under Rule 24 cannot be met.

Some class actions, such as the one at issue here, do not allow class members to opt out. It is important to recall, however, that in order for such an action to proceed, the district court must make the determinations called for by subsections (a) and (b) of Rule 23 — including that the class is too numerous to allow practical joinder of all class members, that the named parties have typical claims or defenses and "will fairly and adequately protect the interests of the class,"

and that the circumstances of the case otherwise make it appropriate to use representative procedures. The Rule gives the district court broad discretion to ensure the fairness of the proceeding, including requiring that some or all class members be given notice of the pendency of the action and of the opportunity to intervene or otherwise appear. *See* Fed. R. Civ. P. 23(d). And if the representative parties propose to settle the case, the rule requires notice to all class members and the consent of the district court, which the court will not give unless it has determined, after hearing any objections, that the settlement is fair. *See* Fed. R. Civ. P. 23(e).

Further, the possibility of intervention provides adequate protection where there is no right to opt out. A proposed appellant who has not even attempted to intervene to protect his personal interest in an appeal has little justification for complaint, as we discuss more fully *infra*.[7] An objector who seeks to intervene but is denied permission to do so is protected both by process in the district court, and by the right to appeal the intervention ruling. The competing demands of orderly representative litigation, on the one hand, and individual class members' personal interests should surely inform the application of Rule 24 in deciding requests to intervene. But the fact that there can be legitimate individual interests does not mean that no standards whatsoever should be applied in determining whether an individual should be allowed to appeal.

Of course, in any collective process that ends in a negotiated compromise, there will likely be some individuals or groups who remain disgruntled. That is particularly true in complex actions that involve different subgroups, with par-

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[7] As the Court is aware, Charles C. Yeomans has filed an *amicus* brief supporting petitioner in the instant case, and refers at p. 2 n.4 of his brief to a case pending before the Ninth Circuit captioned *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-56958 (9th Cir.). In that case the district court approved the settlement of a class action against Citibank (South Dakota), N.A., and Yeomans has filed an appeal to challenge the district court's approval, although he did not even seek to intervene in that court.

ticular interests that overlap and to some degree conflict. It is, however, part of the nature of a representative litigating process that some dissenting voices or alternative proposals may be overridden by those properly selected as representatives to conduct the litigation. Due process and the federal rules require fair and adequate representation, not representation that is to the precise liking of every member of the represented class. Under Rule 23, moreover, a settlement may be implemented only if the district court, having heard any objections, determines that it is proper to proceed despite them. That opportunity for a hearing and decision by the district court is an adequate safeguard for class members who raise individual objections to a proposed settlement. Without some further showing, there is no need to give individual objectors the further right to step outside the representative process and take unilateral appeals if they cannot qualify for intervention under an appropriate application of the Rule 24 standards.

2. The second concern advanced as a justification for appeals by unnamed class members is the possibility that the named class representatives, and their counsel, who negotiate a settlement may fail to act in the best interests of the class. While the adequacy of class representation is obviously a central issue, it too is already addressed by the procedures expressly set out in Rule 23. Any appellate check on the operation of those procedures should flow from, not supplant, their existing structure.

a. As we have discussed, Rule 23 sets out multiple standards designed to ensure that a class action will proceed as such only if collective, representative litigation is appropriate in the particular case. *See* Fed. R. Civ. P. 23(a) (prerequisites for class action, including typicality of named parties' claims and adequacy of representation) and 23(b) (circumstances under which collective model is appropriate). It relies on the district court to make threshold determinations, *see* Rule 23(a)-(b), (c)(1); to oversee the proceedings, including making appropriate orders "for the protection of the members of

the class or otherwise for the fair conduct of the action," *see* Rule 23(d)(2); and to consider and approve or reject any proposed settlement, *see* Rule 23(e). And within that framework, it obviously relies to some extent, as a practical matter (and like any litigation), on the self-interest, good faith, competence, and ethics of the named parties and their counsel.

The rule also expressly contemplates at least three ways in which class members not originally named as representative parties may become more directly involved — if, for example, they are concerned about the adequacy of class representation. First, in an action certified under Rule 23(b)(3), the notice provided to class members must inform them that if they do not opt out of the class, they may, if they wish, "enter an appearance through counsel" and thereby be kept abreast of developments in the case. (*See supra* n.5.) Second, Rule 23(d)(2) provides that the district court may at any time require that class members be given notice of, among other things, "the opportunity . . . to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action." Even if the district does not order such notice in a particular case, the provision for it clearly contemplates both formal intervention and other possible means, regulated by the district court, for non-named parties to appear and participate to varying extents in the case if they have concerns about the adequacy of class representation. *See also* Rule 23(d)(3) (authorizing district court to "impos[e] conditions on the representative parties or on intervenors"). Third, if a settlement is proposed, the Rule provides for notice to the class, and the district court will hear any objections from non-named class members before it enters judgment.

These provisions of Rule 23 suggest a flexible approach to potential participation by non-named class members in the district court. They also suggest a spectrum of possible degrees of involvement, from "enter[ing] an appearance," which might involve little more than receiving copies of litigation papers (*see supra* n.5), to appearing only at a settle-

ment fairness hearing, to "com[ing] into the action" at an earlier point in some manner determined by the district court, to formal intervention as a separate, named party to the case. That spectrum, finally, suggests an appropriate, rule-based rubric for determining whether a class member who is not a named class representative should be permitted to appeal from the judgment entered on a settlement. Given the overall representative framework of Rule 23, and the significant departure from that model entailed by allowing appeals from a settlement, the right to take a separate appeal is best tested by the standards for formal intervention in the action.

b. Those standards are set out in Rule 24. At the core of those standards is the existence of a legitimate interest on the part of the proposed intervenor, and whether intervention is necessary or appropriate in order to protect that interest. For example, in ruling on a motion to intervene as of right, *see* Fed. R. Civ. P. 24(a)(2), the district court is specifically required to consider whether "the applicant's interest is adequately represented" already.

In the class-action context, the same consideration should also be central to any discretionary decision under Rule 24(b)(2). *See, e.g.*, *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992) (affirming denial of permissive intervention where proposed intervenor's interests were "adequately represented by an existing party"); *People v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (same); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978) (same). Under either standard, this factor has particular relevance to the question presented here, because a principal justification offered for appeals by unnamed class members who object to settlement is the possibility that the named class representatives will have compromised the class's claims in a way that is inadequate or unfair to all or part of the class. If an unnamed class member wishes to make such a showing on appeal, he or she should certainly be prepared to make it in the district court in the first instance.

c. For these reasons, consideration of a motion to intervene is not only a procedurally familiar way of approaching this aspect of class-action management, but also a highly appropriate rubric for deciding whether a particular unnamed class member should be permitted to enter the litigation in a capacity that will entail either the right to agree to any settlement, or the right to appeal if a settlement is approved over her objection. If such a motion is granted, it should follow that the intervenor has the same procedural rights as any other named party — subject to any limitations that may be imposed by the district court. *See, e.g.*, Fed. R. Civ. P. 23(d)(3). If it is denied, that denial is itself appealable. *See, e.g.*, *Marino*, 484 U.S. at 304.

As a matter of orderly judicial administration, there are two important consequences of adopting the intervention standard as the basis for a right to appeal from a class-action settlement. First, it ensures that the district court will have a chance to address, in the first instance, the most relevant issues bearing on whether such an appeal should be allowed. And the district court, far more than an appellate court, will be well situated to create a factual record if necessary concerning the adequacy of ongoing representation absent intervention, and the need and justification for intervention by others in order to protect legitimate class and individual interests. If the would-be appellant has no obligation to intervene at the district court level, such a record may never be created. Second, if the district court denies a motion to intervene and the disappointed objector appeals, the court of appeals will have the benefit of the district court's views on those critical questions, and can efficiently determine, at the threshold, whether the decision on *intervention* — rather than the decision to approve the settlement – was proper. [8] Both

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[8] Appellate courts review the denial of a motion for permissive intervention under Rule 24(b) for abuse of discretion. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000); *Donnelly v. Glickman*, 159 F.3d 405, 411-12 (9th Cir. 1998); *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). The Circuits

the provision of focused information to the court of appeals and the modest raising of the appellate bar for non-intervening objectors will enhance appellate efficiency, and they are fully appropriate in the context of a representative action, in which the duly certified class representatives have already settled the case with judicial approval.

B. Petitioner's Objections to Use of the Intervention Procedure in This Context Are Insubstantial

Petitioner and his amici argue that use of the intervention standard in this context is unfair or unworkable, but their objections do not withstand examination. Most importantly, there is little weight to the complaint that an intervenor will be subject to extensive procedural requirements, or unfairly required to shoulder litigation burdens such as discovery. *See, e.g.*, Pet. Br. 39. There is no reason to suppose that the forms of pleading required for an intervention motion will be unduly difficult to produce for one who intends, after all, to impose the burdens of an appeal on all the existing parties.[9] As to discovery, if a class member is permitted to intervene at the time of a settlement hearing, there may well be little or no reason to take discovery. If intervention comes earlier, full discovery may be appropriate. At any stage, if the class member is seeking to become so much a "party" to the proceedings that he will be entitled to appeal from the judgment,

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have adopted varied standards of review for appeals from the denial of a motion to intervene as of right under Rule 24(a). *See, e.g., In re Holocaust Victim*, 225 F.3d at 197 (abuse of discretion standard appropriate); *Donnelly*, 159 F.3d at 409 ("We review a district court's denial of a motion for intervention as of right de novo, except that we review questions of timeliness for abuse of discretion."); *Twelve John Does*, 117 F.3d at 575 (abuse of discretion standard appropriate "to the extent that it turns on the adequacy of representation by existing parties").

[9] Of course, if the intervenor is seeking to "present [new or materially varied] claims or defenses," Fed. R. Civ. P. 23(d)(2), then there is every reason to require a complaint in intervention that specifically "set[s] forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

then in most cases surely there will be no just objection to requiring him to comply with the normal litigation burdens undertaken by any named party to the case — including providing other parties with any discovery that may be appropriate under the federal rules. Where relief from such burdens is appropriate, the district court can make orders suitable to the circumstances.

Petitioner's argument concerning litigation burdens, and his argument that class members often receive notice of a class action at the same time that they receive notice of a proposed settlement, do point up reasons why there is little need to fear another specter that he seeks to raise: that an intervention requirement will lead to large numbers of "prophylactic" interventions early in class cases, and inconveniently multiply the number of named parties in class litigation. *See* Pet. Br. 36-38. In deciding whether to intervene, just as in deciding whether to opt out of a class, a class member must always weigh the potential benefits and burdens of controlling her own litigating destiny, on the one hand, and trusting largely to the representative process, on the other. The balance is unlikely to change dramatically for most class members if this Court confirms that one cost of accepting representation is that the representatives will negotiate the details of any settlement, and unnamed class members will be able to raise objections only in the district court unless they file a timely motion to intervene. Certainly petitioner adduces no evidence that such consequences have followed in the circuits that already require intervention as a predicate for appeal.

C. Allowing Unfettered Individual Appeals by Objectors to Class Action Settlements Imposes Significant Costs

Any appeal from an otherwise concluded settlement imposes significant costs — on the class, on other parties to the case, and on the judicial system. It threatens to upset, at the behest of one litigant, compromise agreements that are often

heavily negotiated and carefully balanced among a variety of competing interests. At a minimum, it imposes considerable — and sometimes very lengthy — delay and substantial expense on the named parties, and through them on all members of the class.

Such costs are sometimes an inevitable part of the legal system, and they are no doubt worth bearing if an objecting class member can convince the district court that there is sufficient reason to question the adequacy of class representation, or the fairness (or legality) of the settlement, that the court should permit intervention for the purpose of raising those issues on appeal. The costs are also worth bearing if the class member can convince the court of appeals that the issues he or she seeks to raise are so substantial that the district court abused its discretion in denying a motion to intervene (at whatever stage of the proceedings).

There is, however, no sufficient justification for allowing any objector to impose such costs unilaterally. Under that legal standard for allowing objector appeals (which is to say, no standard), the risks of collusion or miscarriage of process in the district court settlement process, on which petitioner lays so much stress, are easily offset by the risk of "strategic" behavior by non-named class members and their counsel.

Once a settlement has been negotiated with the representative plaintiffs, notice will be given to class members under Rule 23(e). That notice alone may cost several million dollars in a large case. Once it has been given, objectors may materialize to raise legitimate concerns about the substance of the settlement and its fairness to the class — or, unfortunately, to attempt to take personal advantage of the fact that any material change in the settlement will require considerable additional delay and expense. It is easy to see that there can be great pressure on the named parties (both plaintiffs and defendants) to pay substantial amounts of "ransom" to such objectors in order to avoid even greater costs of delay or reworking of the settlement. *Cf. Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 1999) (recogniz-

ing that side payments to objectors — particularly after an objector files an appeal — "raise[] the specter of extortive legal proceedings pressed 'not to redress real wrongs, but to realize upon their nuisance value.'") (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949)).

These problems exist to some extent, of course, at the district court level, and the primary systemic line of defense against them is active supervision of the objection process by the district court. If district judges are careful in sorting out meritorious from non-meritorious objections, the opportunities for "strategic" behavior by objectors are sharply reduced. The district judge's ability to perform this critical role will, however, be severely compromised if objectors are allowed an unchecked right to appeal from the judgment approving the settlement without being subject to the discipline of district court procedure. Under those circumstances, a "strategic objector" need do no more (and perhaps less) than file an undeveloped statement of objections with the district court in order to stake out her position, prior to submitting an appellate brief (if necessary) months later.

The very real risk — indeed, the reality — of this sort of gaming of the appellate system is a primary reason why it makes sense to require intervention as a gatekeeping mechanism to determine in the first instance whether a settlement objector should be allowed to appeal. The district court is familiar with the named parties, the course of litigation, and the proposed settlement. It has the opportunity to see and evaluate the seriousness and good faith of objectors. It also has the opportunity to make adjustments that may satisfy some potentially meritorious objections without requiring significant delay or additional expense. The system should therefore require that objectors make their best case to the district court first, as an intervention requirement tends to ensure.

III. ARGUMENTS FOR THE EXPANSION OF APPEAL RIGHTS FROM NAMED TO NON-NAMED CLASS MEMBERS SHOULD BE MADE AND ADDRESSED THROUGH THE PROCESS FOR AMENDING THE FEDERAL RULES

For the reasons we have explained, requiring intervention as a predicate for independent appeal of an otherwise final settlement, when undertaken by a class member who has not been certified as a representative, is the solution most consonant with the present text, structure, and theory of Rule 23. There are, of course, arguments for change in the class-action process. In this as in other instances, however, the better approach for courts deciding current cases, including this Court, is to hew close to the lines drawn by the existing rules.

Recent draft amendments to Rule 23 highlight the fact that any change to the intervention requirement can and should be considered through the existing process for amending the Federal Rules. In August 2001, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sought public comment on an extensive set of tentative proposed amendments to Rule 23, currently under consideration by the Conference's Advisory Committee on the Federal Rules of Civil Procedure. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence* (Aug. 2001) ("Proposed Rules"). The published proposals, which "grow[] out of ten years of Advisory Committee work" and reflect "the light of experience, empirical study, and academic and professional commentary," take "improving review of class-action settlements" as one "central focus." Proposed Rules at 22, 24 (memorandum of transmittal).

Notably, given that focus and the considerable discussion in the accompanying transmittal and commentary of the

issues and problems with class-action settlements, the proposed amendments deal entirely with settlement procedures and oversight *in the district court*. The only mention of settlement *appeals* occurs in the Committee's commentary to its proposed new Rule 23(e)(4), which would newly provide that any class member may object to a proposed settlement that requires approval by the district court — and (to regulate strategic behavior) that any objection, once lodged, could be withdrawn only with the approval of the court. *Id.* at 53 (§ 23(e)(4)).

That commentary notes that while "[a] class member may appear and object without seeking intervention[, m]any courts of appeals . . . have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court," so that "[a]n objector who wishes to preserve the opportunity to appeal is well advised to seek intervention." *Id.* at 65. Furthermore, it notes specifically that, as we have argued, "[t]he important role that is played by some objectors must be balanced against the risk that objections are made for strategic purposes." *Id.* at 66. Observing that "[a]n objection may be ill-founded, yet exert a powerful strategic force," in part because "[b]oth initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members," the commentary urges courts to be "vigilant to avoid practices that may encourage unfounded objections." *Id.* at 66-67.

The structure of these tentative proposed amendments, and the commentary's accompanying observations, support the arguments that we have advanced in this brief. Perhaps even more important, however, they reflect the appropriate process for proposing, debating, and crafting changes to the rules that govern class-action litigation. Unless and until that process generates proposals for change in the appeal rights of unnamed class members, by far the better course for this Court is to adhere to the traditional mechanism of intervention, allowing district courts to fully and effectively dis-

charge their function as gatekeepers to the appellate process and principal managers of complex class actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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